Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

CITY OF ATLANTA, GEORGIA,

Petitioner,

v.

R. MAYER OF ATLANTA, INC.; TONY N. UPCHURCH d/b/a CHUCK'S TRUCK; REGINA JENKINS d/b/a JENKINS WRECKER SERVICE CO.; FRED BURT d/b/a QUALITY WRECKER SERVICE; and UPMAN'S WRECKER SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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136 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Eleventh Circuit erred in construing 49 U.S.C. § 14501(c) to expressly preempt, completely and entirely, the regulations of the City of Atlanta (and, in effect, all other municipalities) pertaining to all aspects of the towing industry, except the price of nonconsensual tows.

2. Whether the Court of Appeals for the Eleventh Circuit erred by construing 49 U.S.C. § 14501(c) to usurp the authority of the State of Georgia (and, in effect, all other states) to delegate the regulation of the towing industry to its political subdivisions through home-rule charter and/or statutory authorization.

3. Whether the Court of Appeals for the Eleventh Circuit erred in determining that §§ 162-223(a)-(c) of the City of Atlanta Wrecker Code are preempted and unenforceable in their entirety as the parties before the court challenged these provisions only to the extent that they regulate consensual towing services performed by towers whose principal places of businesses are located outside the City limits and who generate less than 50% of their income from within the City limits; and therefore, the parties before the court lack standing to assert claims challenging these provisions to the extent that they regulate consensual and nonconsensual towing services performed by towers whose principal places of business are located within the City limits and/or who generate more than 50% (if not all) of their income from within the City limits.

QUESTIONS PRESENTED FOR REVIEW – Continued

4. Whether the Court of Appeals for the Eleventh Circuit improperly intruded into the legislative branch of the government by determining that either the Secretary of Transportation or the Surface Transportation Board found it necessary to exercise jurisdiction over the towing industry when the record before the court contained no evidence to support such a decision.

5. Whether the Court of Appeals for the Eleventh Circuit improperly decided an important matter of federal law that was not raised in Respondents' Complaint, but rather was raised in Respondents' motion for summary judgment.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following individuals were parties before the court of appeals: Eldrin Bell, C. T. Padgett, E. C. Johnson, and Bill Goryca.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, City of Atlanta, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *R. Mayer of Atlanta, Inc., et al. v. City of Atlanta, Georgia, et al.*, 158 F.3d 538 (11th Cir. 1998) (App. 1). The opinion of the United States District Court for the Northern District of Georgia granting summary judgment to Petitioner and against Respondents (App. 54) is not published.

STATEMENT OF JURISDICTION

1. The date of the entry of the judgment or decree sought to be reviewed is October 23, 1998. On that date the United States Court of Appeals for the Eleventh Circuit vacated the order of the United States District Court for the Northern District of Georgia, which had granted summary judgment to Petitioners and against Respondents, and remanded for further proceedings consistent with its Opinion. (App. 1).

2. The statutory provision which confers jurisdiction on this Court to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

The Appendix sets forth verbatim the relevant portions of the following statutory and regulatory provisions: 49 U.S.C. § 13101 (App. 66); 49 U.S.C. § 13506 (App. 67); 49 U.S.C. § 14501 (App. 68); O.C.G.A. § 36-35-3 (App. 72); O.C.G.A. § 44-1-13 (App. 72); O.C.G.A. § 46-1-1(9) (App. 74). City Code §§ 162-223 (App. 78); 1996 City of Atlanta Charter § 1-102(b) and (c) (App. 93).

STATEMENT OF THE CASE

A. Statement of Facts

The City of Atlanta Code of Ordinances contains provisions which govern the operation of wrecker services within the City of Atlanta. (App. 78). The provisions (hereinafter the "Wrecker Code") pertain to all types of towing that occur on the City streets, including both nonconsensual and consensual towing, and require that a license must be obtained from the City of Atlanta (hereinafter the "City") before a tow may occur within the City limits. (App. 79-80). There is no dispute that the authority to regulate the towing industry was clearly delegated to the City by the State of Georgia through the enactment of the City's Charter and through provisions set forth in State law. *See* O.C.G.A. §§ 36-35-3 (App. 72); 44-1-13(b) (App. 72); 46-1-1(9)(C)(xi) (App. 74); and §§ 1-102(b) and 1-102(c)(2), (17), (21), (29), (36), (54), and (56) of the 1996 Charter of the City of Atlanta (App. 93).

The Respondents in this case are five owners and operators of towing and recovery businesses whose principal places of businesses are located outside of the City limits. (App. 25). The only type of towing performed in

the City by Respondents is the type known as "consensual" in which the owner of a vehicle expressly requests that a vehicle be towed by a specific towing company, and the owner enters into a private contract with the towing company for the services to be performed. Between October 26, 1990, and May 18, 1992, Respondents and/or their employees were charged with violating Sections 162-223(a) and 162-223(c)[1] of the City's Wrecker Code by performing consensual towing services in the City without having obtained permits issued by the City to operate on City streets. (App. 3). All but one of the charges filed against Respondents resulted in convictions. (App. 3).

Specifically, Section 162-223(a) of the City Wrecker Code provides in pertinent part:

> It shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to use or operate upon any of the streets of the city a wrecker as defined in this chapter or to do any trespass towing without having obtained a license granted by the mayor as provided herein in accordance with O.C.G.A. § 44-1-13.

(App. 79-80). Section 162-223(b) of the City Wrecker Code sets forth the requirements that must be met in order to obtain a license from the mayor. Pursuant to Section 162-223(b), an applicant must provide his name and

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[1] Respondents were actually cited with violating Sections 14-9003(a) and 14-9003(c) of the City's Wrecker Code. However, on January 1, 1996, the City's Code of Ordinances was recodified and new numbers were assigned to each of the code sections contained therein. In order to avoid confusion between this petition and the Eleventh Circuit Opinion, Petitioner will refer to the relevant provisions by their current numbers.

address; place of business; the nature and character of the business; the names of partners, if any; the names of all officers, if the applicant is a corporation; the list of the charges to be imposed by the applicant for towing services; and information regarding insurance held by the applicant. (App. 80). Section 162-223(c) provides that it is unlawful for "any person . . . to use or to operate upon any of the streets of the city any wrecker without having first filed a registration of all these vehicles with the department of police." (App. 80-81).

On August 23, 1994, the United States Congress enacted the Federal Aviation Administration Authorization Act of 1994 (hereinafter "FAAA Act"). The FAAA Act was codified as part of the Interstate Commerce Act (hereinafter "ICA") and became effective January 1, 1995. P.L. No. 103-305, 108 Stat. 1569, 1607 (1994). Section 601 of the FAAA Act, then codified at 49 U.S.C. § 11501(h), set forth a general rule regarding Interstate Commerce Commission authority over intrastate transportation and provided for preemption over certain aspects of state economic regulation of motor carriers. This general rule provides in pertinent part that:

> a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C.A. § 11501(h)(1) (1995).[2] In addition, Section 601 of the FAAA Act provided exceptions to this general rule.

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[2] As detailed below, this provision is now codified at 49 U.S.C. § 14501(c)(1). (App. 68-69).

Specifically, the FAAA Act provides that the above general rule

> shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. § 11501(h)(2)(A).[3]

On December 29, 1995, Congress passed the Interstate Commerce Commission Termination Act (hereinafter "ICCTA") of 1995, which became effective on January 1, 1996. P.L. No. 104-88, 109 Stat. 803, 804. Section 103 of the ICCTA recodified former 49 U.S.C. § 11501(h) as 49 U.S.C. § 14501(c). Although the ICCTA basically left the preemption language of 49 U.S.C. § 11501(h)(1) undisturbed, it added "brokers" and "freight forwarders" to the persons/entities covered by the provision. The ICCTA also included a new provision stating that the general preemption rule

> does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or

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[3] This provision is now codified at 49 U.S.C. § 14501(c)(2)(A). (App. 68-70).

> authorization of the owner or operator of the motor vehicle.

49 U.S.C. § 14501(c)(2)(C). (App. 68-70).

B. History of Proceedings Below

This lawsuit was commenced on May 18, 1992, when Respondents filed a four-count complaint in the United States District Court for the Northern District of Georgia against the City of Atlanta and various officials and employees of the City, challenging the application of the City's Wrecker Code to towing firms and tow truck drivers whose principal places of business are located outside the municipal boundaries of the City and who do not generate 50% or more of their gross income from business within the incorporated area of the City of Atlanta (App. 25, ¶ 1). In their Complaint, Respondents specifically challenge City Code § 162-223 and do not reference any other section of the City's Wrecker Code. Respondents claim that § 162-223 violates the Commerce and Due Process Clauses of the United States Constitution (App. 37-38, ¶¶ 46-50), tortiously interferes with their contracts (App. 38-39, ¶¶ 51-54), and is pre-empted by O.C.G.A. § 48-13-10.1 (App. 39-40, ¶¶ 55-57).[4] In their Complaint, Respondents seek a permanent injunction against the enforcement of § 162-223, declaratory judgment that this section is unconstitutional, and compensatory damages related to their convictions. (App. 4).

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[4] The district court found that because O.C.G.A. § 48-13-10.1 had been repealed, the claim regarding a violation of that section was moot. Furthermore, the district court dismissed Respondents' tortious interference with contract claim. Respondents did not appeal these rulings to the Eleventh Circuit Court of Appeals.

On December 19, 1995, Respondents moved to supplement their Complaint to add an allegation that 49 U.S.C. § 11501 preempts the ordinances challenged in the original Complaint. (App. 47). Although the district court denied such motion (App. 50), Respondents raised the issue of preemption in a motion for summary judgment.

In ruling on motions for summary judgment filed by all parties, the district court granted summary judgment in favor of the City of Atlanta and the individually named defendants and against Respondents on all of Respondents' claims and dismissed the action with prejudice. (App. 54). In addressing the issue of preemption raised by Respondents, the district court stated:

> Even if, however, [Respondents'] pre-emption claim were part of their complaint, the court would grant summary judgment on this claim as well. The court is not convinced that in enacting § 11501, Congress intended to pre-empt all state and municipal statutes and regulations that regulate the towing and recovery industry. *See Giddens v. City of Shreveport*, 901 F.Supp. 1170, 1182-83 (W.D. La. 1995) (concluding that 49 U.S.C. § 11501 did not pre-empt local towing ordinance). Consequently, [Respondents'] pre-emption claim necessarily fails.

(App. 63).

Pursuant to 28 U.S.C. § 1291, Respondents appealed the district court decision to the Court of Appeals for the Eleventh Circuit. The Eleventh Circuit found that the ICA expressly preempts municipal ordinances that regulate consensual towing, and that the exceptions to such preemption do not pertain to municipal ordinances that address safety and insurance requirements. (App. 2). The court further declared that City Code Sections 162-223(a)-(c) are preempted by 49 U.S.C. § 14501(c)(1)

and are unenforceable. (App. 22-23). As the court found the federal preemption claim to be dispositive, it did not consider Respondents' claims regarding violations of the Commerce and Due Process Clauses. (App. 6 n.4). The Eleventh Circuit vacated the district court order and remanded for further proceedings consistent with its opinion. (App. 2). Petitioner seeks certiorari from the Eleventh Circuit's decision.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE WHETHER 49 U.S.C. § 14501(c) EXPRESSLY AND MANIFESTLY PREEMPTS THE AUTHORITY OF STATES AND THEIR POLITICAL SUBDIVISIONS FROM REGULATING THE TOWING INDUSTRY IS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT REGARDING THE ISSUE OF STATUTORY CONSTRUCTION.

The United States Supreme Court has never addressed the issue of whether 49 U.S.C. § 14501(c) expressly and manifestly preempts the authority of states and their political subdivisions from regulating the towing industry. A decision of the Court on this issue would clearly have widespread and profound effects upon all municipalities in the country and upon the public safety of the citizens of the United States. A determination as to the preemptive scope of this statute is a matter of critical importance because preemption results in a complete lack of any meaningful regulation of the towing industry, as

there currently exists no comprehensive federal regulatory scheme that pertains to the towing industry and any State regulation that exists is minimal at best.

Petitioner urges this Court to examine the Eleventh Circuit's decision that 49 U.S.C. § 14501(c) preempts state and local government regulation in the field of towing because it is based on two invalid premises. First, the Eleventh Circuit has determined that because the FAAA Act was later amended to include a provision that specifically references "tow trucks" then the entire Act must have contemplated the inclusion of the tow truck industry within its preemptive reach. (App. 9-10). Second, the Eleventh Circuit has determined that even though the FAAA Act provides that states can clearly regulate motor carriers regarding public safety, the imposition of certain highway route controls or limitations, and the establishment of minimum insurance requirements, states cannot delegate this authority to their political subdivisions even though the FAAA Act contains no such prohibition. (App. 14-22). Below, Petitioner addresses each of these premises. However, Petitioner begins with the Eleventh Circuit's determination that 49 U.S.C. § 14501(c) prohibits states from delegating regulatory authority to their political subdivisions because such decision is directly in conflict with the law of this Court.

Petitioner commences its analysis regarding the problems imposed by the two aforementioned premises with the cardinal rule of the Court that when examining preemption, courts should start "with the assumption that the historic police powers of the States [are] not superseded by the Federal Act unless that [is] the **clear and manifest** purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447

(1947) (emphasis added). That purpose may manifest itself in one of three distinct ways. First, Congress may have expressly stated its intention to preempt state and local law in the language of the statute itself. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-09, 611-12, 111 S.Ct. 2476, 2478, 115 L.Ed.2d 532 (1991). Second, absent explicit preemptive language, Congressional intent to preempt state and local law may be inferred if Congress has regulated a field so pervasively or "the federal Act touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* Third, if state and local law conflict with federal law or interfere with the achievement of federal objectives, then preemption occurs. *Id.*

In the case at bar, the Eleventh Circuit finds that implied preemption is inapplicable to its review. (App. 8). Therefore, Petitioner will limit its argument to express preemption only.

A. Assuming *Arguendo* That By Enacting 49 U.S.C. § 14501(c), Congress Intended To Generally Preempt Regulation Of The Towing Industry By States And Their Political Subdivisions, The Statute Does Not Clearly And Manifestly Express An Intent To Preempt States From Delegating To Their Political Subdivisions The Authority To Regulate Certain Aspects Of The Towing Industry Regarding Public Safety, Highway Route Controls And Insurance Requirements.

For purposes of the argument presented in this section of its petition, Petitioner will assume that the Eleventh Circuit correctly held that through 49 U.S.C. § 14501(c)(1), Congress created a general prohibition

against both states and political subdivisions, restricting these governmental entities from regulating the towing industry, among others. 49 U.S.C. § 14501(c)(1) reads in pertinent part:

> (c) Motor carriers of property. –
>
> (1) General Rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority or 2 or more States **may not** enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transported property.

49 U.S.C. § 14501(c)(2)(A). (App. 68-70). However, Congress also provided an exception to this general prohibition. The exception, 49 U.S.C. § 14501(c)(2)(A), reads as follows:

> (2) Matters not covered. **Paragraph (1)** –
>
> **(A) shall not restrict** the safety regulatory authority of **a State** with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to the minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.
>
> (emphasis added) (App. 68-70).

1. 49 U.S.C. § 14501(c) Contains No Prohibition Regarding The Ability Of The States To Delegate The Authority To Regulate The Towing Industry To Their Political Subdivisions.

Although the exception, unlike the general prohibition, does not mention political subdivisions, it undoubtedly does not contain any prohibition regarding the ability of the states to delegate the authority to regulate the towing industry to their political subdivisions. *Compare* 49 U.S.C. § 14501(c)(2)(A), *with* 49 U.S.C. § 14501(c)(1). (App. 68-70). In fact, just the opposite is true. *Id.* The general prohibition provides that states and political subdivisions "may not" regulate with regard to price, route, or service. 49 U.S.C. § 14501(c)(1). (App. 68-69). However, the exception to the general prohibition expressly mandates that the general prohibition "shall not restrict the safety regulatory authority of a State with respect to motor vehicles . . . " 49 U.S.C. § 14501(c)(2)(A). (App. 68-70). The language in the exception is unequivocal. *See* 49 U.S.C. § 14501(c)(2)(A). (App. 68-70). Despite Congress' clear prohibition against any restriction of the states' authority to regulate the safety aspects of motor vehicles, to impose certain highway route and limitation controls and to establish minimum amounts of insurance, the Eleventh Circuit attempts to develop an interpretation of Congressional intent in enacting the Act which would override the express language found in 49 U.S.C. § 14501(c)(2)(A).

2. The Decision of the Eleventh Circuit Directly Conflicts With United States Supreme Court Precedent Regarding Statutory Construction.

The Eleventh Circuit holds that the mere silence of the exception found in 49 U.S.C. § 14501(c)(2)(A) as to the

words "political subdivisions" clearly expresses congressional intent to exclude political subdivisions from coming within the exception. (App. 15-16). This finding conflicts with the prior ruling of the Court in *Mortier*. In *Mortier*, a virtually identical case regarding express preemption, the Court held that the failure to include 'political subdivisions' when mentioning 'states' in an exception to a general rule is insufficient to demonstrate a clear and manifest congressional intent to preempt states from delegating authority to political subdivisions. *Mortier*, 501 U.S. at 607; 111 S.Ct. at 2483. The Court further held that "[m]ere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to preempt local authority." *Id.* (*quoting Rice*, 331 U.S at 230, 67 S.Ct. at 1152). The provision at issue in *Mortier*, 7 U.S.C. § 136(v) (hereinafter "FIFRA Provision"), reads as follows:

> (a) A State **may regulate** the sale or use of any federally registered pesticide or device in the State, **but only if and to the extent** the regulation does not permit any sale or use prohibition by this subchapter.
> (emphasis added).

In the FIFRA Provision, Congress only provides that a state "may regulate" certain limited aspects of federally registered pesticides. In this context, the Court noted that the "principle is well settled" that local governmental entities commonly function as agencies of the state, at the discretion of the state. *Mortier*, 501 U.S. at 607-608, 111 S.Ct. at 2483; *see also Sailors v. Board of Ed. of Kent Cty.*, 387 U.S. 105, 108, 87 S.Ct. 1549, 1552, 18 L.Ed.2d 650 (1967); *Reynolds v. Sims*, 377 U.S. 533, 575, 84 S.Ct. 1362, 1388-1389, 12 L.Ed.2d 506 (1964); *Hunter v. Pittsburgh*, 207 U.S. 161, 178, 28 S.Ct. 40, 46, 52 L.Ed. 151 (1907). Moreover, the "exclusion of a political subdivision cannot be

inferred from the express authorization to the 'State[s]' because political subdivisions are components of the very entity the statute empowers." *Mortier*, 501 U.S. at 608, 111 S.Ct. at 2483; *see also, Rice*, 331 U.S. at 229-31, 67 S.Ct. at 1152.

The argument that pursuant to 49 U.S.C. § 14501(c), states retain the authority to regulate safety and insurance aspects of the towing industry is much stronger in the case at bar than even in *Mortier*, as Congress expressly states that "Paragraph (1) [the general prohibition] **shall not restrict** the safety regulatory authority of **a State** with respect to motor vehicles . . . or the authority of a State to regulate motor carriers with regard to the minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." 49 U.S.C. § 14501(c)(2)(A) (emphasis added) (App. 68-70). Necessarily, "shall not restrict" includes a prohibition against an implied restriction against the right of the state to delegate its authority to its political subdivisions.

The more logical reading of a statute expressly excepting states without mentioning political subdivisions is to interpret such provision as leaving "the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation . . . in the hands of local authorities." *Mortier*, 501 U.S. at 608, 111 S.Ct. at 2483. It is irrelevant to the present analysis that Congress may have expressly included the terms "political subdivisions" along with "states" in other provisions while excluding "political subdivisions" from the provision at issue. *Id.*, 501 U.S. at 612, 111 S.Ct. at 2485. Various district courts in Texas and New York have agreed with this analysis and construed § 14501(c)(2)(A) to "permit a municipality to enact safety

regulations if the state expressly has delegated its regulatory authority to its political subdivisions." (App. 15) (*citing Harris Cty. Wrecker Owners for Equal Opport. v. Houston*, 943 F.Supp. 711, at 726-27; and *AJ's Wrecker Serv., Inc. v. City of Dallas*, Nos. Civ. A. 3:97-CV-1311D, Civ. A. 3:97-CV-2398D, 1998 (N.D. Tex. April 15, 1998)). *See also Ace Autobody & Towing v. City of New York*, No. 96-Civ.-6547(DLC) (S.D.N.Y. Oct. 28, 1997) (recognizing that in enacting regulations pertaining to nonconsensual tows, a municipality could rely upon the safety regulation exception from preemption expressly given to states in 49 U.S.C. § 14501(c)(2)(A)).

3. If Congress Desired To Preempt States From Delegating Their Authority To Regulate Safety And Insurance Aspects of the Towing Industry To Political Subdivisions, Congress Simply Should Have Added Language To That Effect.

In its analysis, the Eleventh Circuit fails to address the fact that if Congress had desired to preempt states from delegating the authority to regulate the safety and insurance aspects pertaining to the towing industry, Congress simply could have provided language to that effect. Instead, the Eleventh Circuit's holding conflicts with the established law of the Court and declares that Congress must expressly include "political subdivisions" along with "states" in order for states to have the authority to delegate the powers expressly, and unequivocally, granted them by Congress. *See generally* (App. 14-22) and *Mortier*, 501 U.S. at 612, 111 S.Ct. at 2485. It seems even more compelling that Congress would have added the aforementioned language to preempt the delegation of authority to political subdivisions if Congress had so

intended given the fact that states, like the State of Georgia, already had in place laws which delegated their authority to regulate the safety aspects of the towing industry to their corresponding political subdivisions prior to Congress' enactment of the ICCTA in 1995. *See* O.C.G.A. §§ 44-1-13(b); *see also* 46-1-1(9)(C)(xi); *see generally* O.C.G.A. § 36-35-3 (App. 72-77) (illustrating that the State of Georgia has provided its political subdivisions with home rule powers as detailed in §§ 1-102(b) and 1-102(c)(2), (17), (21), (29), (36), (54), and (56) of the 1996 Charter of the City of Atlanta (App. 93)).

Next, the Eleventh Circuit states that its aforementioned interpretation is congruent with the congressional intent of the ICCTA "as evidenced in the conference report accompanying the ICCTA:

> [T]he conferees believe that preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. **State** economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business."
> (emphasis added).

(App. 17) (quoting H.R. Conf. Rep. 103-677, at 87 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1759)) (hereinafter "Conference Report").

There are several problems with the Eleventh Circuit's interpretation of the aforementioned Conference Report and its inference that said report supports the conclusion that "Congress identified a need to eliminate a

tangled web of state and local ordinances that regulated [tow trucks]." (App. 16-17). First, the Conference Report addresses the inefficiencies which are caused by "State economic regulation." There is no mention at all of political subdivisions in the Conference Report. It is apparent from reading the Conference Report that it addresses the regulation by the states of the aspects of tow trucking which, arguably, are prohibited generally in 49 U.S.C. § 14501(c)(1); not the safety and insurance exceptions granted to the states in 49 U.S.C. § 14501(c)(2)(A). (App. 16-17 and 68-70). Thus, it does not appear that this Conference Report was intended to address the safety and insurance exceptions in the ICCTA at all. Instead, it appears to be directed towards the general prohibitions found in 49 U.S.C. § 14501(c)(1) concerning route, price and service. Finally, it is not readily apparent how there can be a "tangled web of state and local ordinances" when the State of Georgia has fully, and without exception, delegated all of the state regulation of safety and insurance for the towing industry to its political subdivisions. *See* O.C.G.A. §§ 44-1-13(b) and O.C.G.A. § 46-1-1(9)(C)(xi) (App. 72-77; *see also* App. 16-17).

In summary, the dominant weight of authority set forth through a combination of statutory construction and the opinions of this Honorable Court in *Mortier* and *Rice* inevitably leads to the singular conclusion: if Congress had desired to preempt the states from delegating the authority granted to the states by Congress, Congress simply could have expressed such intent in the language of the statute.

B. Neither A Review Of The Express Language Of 49 U.S.C. § 14501(c) In Conjunction With The Interstate Commerce Act Nor A Review Of the Purpose Of 49 U.S.C. § 14501(c) Indicates That Congress Expressly Or Impliedly Preempted The Authority Of Municipalities To Regulate The Towing Industry.

As stated above, the first premise upon which the Eleventh Circuit bases its decision that §§ 162-223(a)-(c) of the City's Wrecker Code are preempted and unenforceable is that the ICCTA contains a provision which expressly authorizes states and their political subdivisions to regulate the price of for-hire motor vehicle transportation by a tow truck without the consent of the owner of the vehicle. (App. 9-10); *see* 49 U.S.C. § 14501(c)(2)(C) (App. 68-70). In making this determination, the court disregards the fact that the statute contains no other references to tow trucks. However, because there exists one such reference, the court has decided that the entire statute was intended to apply to the regulation of the towing industry. (App. 9-10). This premise fails to address several important factors: the express language of 49 U.S.C. § 14501(c); the meaning of the statute in conjunction with the ICA as a whole; and the clear purpose of the statute.

1. The Majority of Courts Which Have Addressed This Issue Conclude That The Language Found In 49 U.S.C. § 14501(c) Does Not Expressly And Manifestly Indicate Congress' Intent To Preempt States And Their Political Subdivisions From Regulating The Towing Industry.

Since the issue of whether 49 U.S.C. § 14501(c) preempts the regulatory authority of state and local governments over the towing industry is a matter of first impression for the Eleventh Circuit, there exists only a

handful of district courts which have addressed this matter.[5] (App. 1). However, the vast majority of these courts have held that Congress did not intend to preempt the authority of municipalities to regulate the towing industry. *See Brumfield Towing Serv., Inc. v. City of Baton Rouge*, 911 F.Supp. 212, 220 (M.D. La. 1996); *426 Bloomfield Ave. Corp. v. City of Newark*, 904 F.Supp. 364, 374 (D.N.J. 1995); *Giddens*, 901 F.Supp. 1170; *Interstate Towing v. City of Cincinnati, Ohio*, 6 F.3d 1154, 1158 n.4 (6th Cir. 1993); *but see Ace Auto Body & Towing, Ltd. v. City of New York*, No. 96-Civ.-6547(DLC), (S.D.N.Y., 1997); *Harris Cty.*, 943 F.Supp. at 726; *Auto Insurers Bureau of Mass. v. Commissioner of Ins.*, 650 N.E.2d 1234, 1240 (Mass. 1995).

The Eleventh Circuit points out that the cases which conclude that Congress did not intend to preempt the authority of municipalities to regulate the towing industry all occurred before the ICCTA was enacted. (App. 10-11). Furthermore, the Eleventh Circuit concurs with the reasoning of the courts in both *Harris Cty.* and *Ace Auto Body*, that the express reference to tow trucks in 49 U.S.C.

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[5] Currently pending in the Fifth Circuit Court of Appeals is the case *Cardinal Towing & Auto Repair, Inc., et al. v. City of Bedford, Texas, et al.*, No. 98-10194, which involves the issue of whether 49 U.S.C. § 14501(c) preempts the authority of municipalities to contractually provide for the nonconsensual towing of abandoned and wrecked vehicles at the request of the police. The district court held that such authority was not preempted. *Cardinal Towing*, 4:97-CV-112-A (Northern District of Texas, Ft. Worth Division), Memorandum Opinion dated January 9, 1998, pp. 5-7. The arguments presented in the case will most likely be substantially similar to those set forth in the instant case. Oral argument in *Cardinal Towing* is scheduled for February 1, 1999.

§ 14501(c)(2)(C) "provides conclusive evidence that Congress intended to extend the general rule of preemption to those aspects of the towing industry that are not listed within the exception." (App. 11). This reasoning does not comport with the basic assumption that this Court utilizes in considering preemption cases, i.e., that federal law does not supersede the states' historic powers unless Congress clearly and manifestly expresses such a purpose. *Mortier*, 501 U.S. at 597; 111 S.Ct. at 2478. The amendment's reference to tow trucks does not aid in proving a clear and manifest expression by Congress to preempt the authority of municipalities to regulate the towing industry. Rather, the amendment only expresses Congressional intent to undoubtedly allow municipalities to regulate the reasonableness of prices charged by tow truck operators who without such regulation could "remove a damaged or illegally parked car and charge its owner limitless and extortionate fees before releasing the vehicle." *426 Bloomfield Ave.*, 904 F.Supp. at 374.

If the intent of Congress in enacting the FAAA Act was to preempt the authority of state and local governments from regulating the towing industry, Congress could certainly have stated this intent as it has before in other statutes. For instance, Section 5 of the Federal Cigarette Labeling and Advertising Act as amended by the Public Health Cigarette Smoking Act of 1969 is entitled "Preemption" and contains the clear statement: "[n]o requirement or prohibition based on smoking and health shall be imposed under State law. . . . " 15 U.S.C. § 1334(b). Pursuant to the clear language set out in Section 5, there can be no doubt that Congress clearly and manifestly intended to preempt the regulatory authority of the states in this instance. *Cipollone v. Liggett Group, Inc.*, 505 U.S.

504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). However, Congress did not provide such language in 49 U.S.C. § 14501(c). (App. 68-70). Therefore, it is necessary to examine other factors, such as the context in which the statute was written, to determine the intent of Congress in enacting the statute.

2. Although The Eleventh Circuit Examined 49 U.S.C. § 14501(c) In Conjunction With Portions Of The Interstate Commerce Act To Reach Its Decision, The Court Improperly Intruded Into The Legislative Branch Of The Federal Government And Rendered A Decision That Is Not Supported By The Record.

When addressing the issue of whether a federal statute preempts state and local laws, it is imperative that courts consider the whole statute, "since the meaning of statutory language, plain or not depends on context." *426 Bloomfield Ave.*, 904 F.Supp. at 368. Thus, in order to understand the scope of 49 U.S.C. § 14501(c), it must be read in the context of the entire Interstate Commerce Act of which it once was a part. *See id.; Harris Cty.*, 943 F.Supp. at 720.

One of the most important observations that can be made from an examination of the Interstate Commerce Act is that the word "towing" appears only one time in the entire Act. *426 Bloomfield Ave.*, 904 F.Supp. at 369; 49 U.S.C. § 13506(b). (App. 67-68). The particular section in which the words appear provides in pertinent part that:

> [e]xcept to the extent the Secretary or Board, as applicable, finds it necessary to exercise jurisdiction to carry out the transportation policy of section 13101, neither the Secretary nor the Board has jurisdiction under this part over –

> (1) transportation provided entirely in a municipality . . . [or]
>
> (3) the emergency **towing** of an accidentally wrecked or disabled motor vehicle.

49 U.S.C. § 13506(b)(1) and (3) (emphasis added) (App. 67-68). As Petitioner argued in the Eleventh Circuit, these sections clearly "limit the preemptive effect of 49 U.S.C. § 14501(c)(1) to the extent that Atlanta's towing ordinance regulates transportation that is (a) provided entirely within city limits or (b) related to the emergency towing of disabled vehicles." (App. 10). However, the Eleventh Circuit disagrees with Petitioner's argument and finds, as did the court in *Harris Cty.*, that because 49 U.S.C. § 13506(b) authorizes the Secretary of Transportation (hereinafter "Secretary") and the Surface Transportation Board (hereinafter "Board") to exercise jurisdiction when "necessary . . . to carry out the transportation policy of [49 U.S.C. §] 13101" the City's ordinances are preempted. (App. 11-13); and *see also* 49 U.S.C. § 13506(b) (App. 67-68).

The Eleventh Circuit's decision is flawed. There can be no doubt, and the Eleventh Circuit agrees, that pursuant to 49 U.S.C.13506(b), the Secretary and the Board are prohibited from exercising jurisdiction over intrastate towing **unless they find it necessary to do so** to carry out the interstate transportation policy of the federal government. *Id. See also Harris Cty.*, 943 F.Supp. at 721; 49 U.S.C. § 13506(b). (App. 67-68). In examining this language in conjunction with the transportation policy of 49 U.S.C. § 13101, the Eleventh Circuit declares

> [w]e . . . **conclude** that enforcement of § 14501(c)(1) in the context of this case does not contravene § 13506(b) because **the exercise of jurisdiction is necessary** to accomplish the policy objectives set forth in § 13101.

(emphasis added) (App. 12-13). This holding is rendered despite the fact that 49 U.S.C. §§ 13101 and 14501(c) (including the exception for tow trucks found in 49 U.S.C. § 14501(c)(2)(C)) are devoid of any language which indicates that either the Secretary or the Board actually **found it necessary** to exercise jurisdiction over either transportation provided entirely in a municipality or the emergency towing of an accidentally wrecked or disabled motor vehicle. (App. 66-71). Nor do the stated policy reasons provided in 49 U.S.C. § 13101 lend guidance. (App. 66-67). In fact, the Eleventh Circuit cites two policy reasons set forth in 49 U.S.C. § 13101 which clearly show that the intent of Congress in enacting the Interstate Commerce Act was to "meet the needs of shippers, receivers, passengers, and consumers" and to "allow a variety of quality and price options to meet the changing market demands and the diverse requirements of the shipping and traveling public." (App. 12); *see* 49 U.S.C. § 13101(2)(C) and (D) (App. 66). Clearly, as is argued in more detail below, shippers and truckers were the targeted industries of the Act; not tow truck services.

The failure of the record in this case to include any evidence that either the Secretary or the Board found it necessary to exercise jurisdiction over either transportation provided entirely in a municipality or the emergency towing of an accidentally wrecked or disabled motor vehicle completely undermines the decision of the Eleventh Circuit. Clearly, either the court has erroneously determined, without support in the record, that the Secretary or Board found it necessary to exercise jurisdiction over these matters, or the court has made such a finding itself. Under either scenario, the court improperly intrudes into the

legislative branch of the federal government and renders a decision based on such invasion.

There exists no basis for reading 49 U.S.C. § 14501(c) independently from 49 U.S.C. § 13506(b). *426 Bloomfield Ave.*, 904 F.Supp. at 373. Thus, intrastate preemption would not be necessary to level the playing field in those areas such as towing that were exempted under 49 U.S.C. § 13506 from the Interstate Commerce Commission's interstate regulations in the first place. *Id.* (App. 67). "Because Congress sought a level playing field, those industries that are exempt from federal regulation under [49 U.S.C. § 13506] should likewise be exempt from intrastate deregulation under [49 U.S.C. § 14501(c)]." *Id.* (App. 67-70).

3. The Eleventh Circuit Decision Fails To Take Into Consideration The Purpose Of 49 U.S.C. § 14501(c) Which Clearly Proves That Congress Did Not Intend To Preempt The Authority Of Municipalities To Regulate The Towing Industry.

Another factor which must be addressed when examining whether a federal law preempts state and local laws is that of the statute's purpose. The FAAA Act was passed as result of the Ninth Circuit Court of Appeals' holding in *Federal Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979, 112 S.Ct. 2956, 119 L.Ed.2d 578 (1992). In that case, the Ninth Circuit held that Federal Express was an air carrier within the meaning of the Airline Deregulation Act of 1978 and thus, would be subject to deregulation. *See 426 Bloomfield Ave.*, 904 F.Supp. at 370. Pursuant to the decision, Federal Express would not have to comply with California's intrastate economic regulations pertaining to shipping activities. Obviously, the deregulated shippers, such as Federal

Express, enjoyed a substantial competitive advantage over shippers that remained subject to state and local regulation. *See Id.*

Congress was concerned about this regulatory inequity and passed the FAAA Act. The House Conference Report clearly indicates that the purpose of the Act was "to create a completely level playing field between air carriers and carriers affiliated with a direct air carrier . . . on the one hand and motor carriers on the other." *Id.* (*quoting* House Conf. Rep. No. 103-677 at 1756). Clearly, the stated purpose of the Act was to establish an equitable playing field **only between shippers and truckers**; not tow truck services. *See Id.* at 371. Accordingly, since tow truck services do not compete with shippers or truckers, tow truck services are plainly excluded from the Act's preemptive reach.

In addressing the issue of preemption, the *426 Bloomfield Ave.* court analyzed whether Congress intended to include tow trucks in the definitions of two terms in the Act, "motor carrier" and "motor private carrier". In determining that Congress did not intend to include tow trucks within such definitions, the *426 Bloomfield Ave.* court stated

> this court is convinced that Congress did not define the terms of the Act broader than necessary to effectuate its clearly expressed purpose of leveling the competitive playing field among inter-modal shippers and truckers. Thus defined, no amount of judicial restraint can yield a definition of "motor carrier" or "motor private carrier" that would include tow trucks.

426 Bloomfield Ave., 904 F.Supp. at 371.

The Eleventh Circuit's decision that 49 U.S.C. § 14501(c)(2)(C) clearly indicates Congress' intent to include tow trucks as being within the preemptive reach of

49 U.S.C. § 14501(c) is erroneous because it fails to consider the purpose of the statute. The FAAA Act clearly authorized Congress to regulate only shippers and truckers, and did not disturb the authority of municipalities to regulate the towing industry.

C. The Decision Of The Eleventh Circuit Leads To An Illogical And Absurd Result Which Places The General Public In A Compromising Position.

The Eleventh Circuit decision leaves the general public in an extremely compromising position. Since Congress has not adopted any type of regulatory scheme pertaining to the towing industry, particularly the emergency non-consent towing of wrecked, disabled or abandoned vehicles, the result of the Court's decision is that the public would be left without any meaningful assurance that the tow truck operators with whom they must deal are safe and are scrupulous business persons and that the streets upon which they drive will be free from public safety hazards. "Given the public's vulnerability to corruption and extortion in the context of non-consensual towing, . . . it would be grossly irresponsible for Congress to have preempted all state and local regulation before adopting its own federal consumer protection scheme. . . . " *426 Bloomfield Ave.*, 904 F.Supp. at 374.

The enactment of public safety regulations by municipalities obviously assists in combatting the public safety hazards presented by wrecked, disabled or abandoned vehicles, such as traffic congestion and blocked roadways. Furthermore, cities have a legitimate public safety concern in limiting the number of wreckers jockeying for position at the scene of an accident. Although through the enactment of 49 U.S.C. § 14501(c)(2)(C), Congress has

expressly ensured that the rates charged for non-consensual tows will be reasonable, the remaining aforementioned public safety concerns will go unaddressed if the Eleventh Circuit decision is allowed to stand.

D. The Eleventh Circuit Erred In Determining That Sections 162-223(a)-(c) Are Preempted And Unenforceable In Their Entirety Because These Provisions Were Challenged Only To The Extent That They Regulate Consensual Towing Services Performed By Companies Whose Principal Places Of Business Are Located Outside Of The City Of Atlanta Limits, And Therefore, The Court Adjudicated The Rights Of Persons Who Are Not Parties To This Action.

The Respondents in this case challenge §§ 162-223(a)-(c) only to the extent that such provisions regulate consensual towing performed by towers whose principal places of business are located outside of the City limits. (App. 25). In its ruling, the Eleventh Circuit ignores this fact and declares that the ordinances at issue are preempted and unenforceable in their entirety. (App. 22-23). The court was bound to determine the enforceability of such ordinances as they applied only to those persons and/or entities who were parties before the court. By declaring the provisions to be completely and entirely unenforceable, the court effectively but improperly adjudicated the rights of persons and/or entities who were not parties in this case. "Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of third persons not parties to litigation" because "ordinarily, one may not claim standing . . . to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U.S.

106, 113-114, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1976). Those towers who perform consensual and/or nonconsensual towing services who operate mainly within the City limits and have their principal places of business therein have clearly received a windfall in that they did not have to litigate the instant matter in order to receive the benefit. The court had no authority to declare the ordinances unenforceable in their entirety, and such decision should be reversed.

E. The Issue Of Preemption Is Improperly Before This Court Because Respondents' Motion To Supplement Their Complaint To Include A Claim For Preemption Was Denied By The District Court.

Rule 15(a) of the Federal Rules of Civil Procedure (hereinafter "FRCP") requires plaintiffs to obtain permission of the court in order to amend pleadings after an answer has been filed. Fed. R. Civ. P. 15(a). While it is true that courts normally construe these amendments quite liberally, it is equally true that a denial of said motion for leave to amend will not be reviewed upon appeal except upon an abuse of discretion. *Fox v. City of West Palm Beach*, 383 F.2d 189, 195 (5th Cir. 1967) (*citing Hall v. National Supply Co.*, 270 F.2d 379 (5th Cir. 1959). One of the factors that a court must consider when deciding whether to allow a motion for leave to amend a pleading is whether the opposing party will be prejudiced by said amendment. *Cessna Aircraft Co. v. Skyways, Inc.*, 532 F.2d 64, 68 (8th Cir. 1976).

In an order dated January 17, 1996, the district court for the Northern District of Georgia summarily denied Respondents' motion to supplement their Complaint on the grounds that Respondents had failed to show that

preemption was an appropriate issue in the present proceeding. (App. 50).

Despite the court's express and unequivocal order of January 17, 1998, Respondents included the claim for preemption in their motion for summary judgment. Although Petitioner argued that the court denied permission to supplement the complaint to include a preemption claim, the district court nonetheless ruled that Respondents did not have a viable preemption claim. (App. 63). After Respondents appealed the district court's decision to the Eleventh Circuit, the Eleventh Circuit also addressed the preemption claim despite Petitioner's reiterating the fact that this issue was not included in the Complaint. *See generally* (App. 1).

Petitioner asserts as error the Eleventh Circuit's decision to resurrect a claim that was never properly before the court at all. Respondents should have appealed the district court decision to deny their motion to supplement their Complaint based upon an alleged abuse of discretion.

As a matter of policy, if this Honorable Court allows the Eleventh Circuit's ruling on preemption to stand, FRCP 15(a), requiring that a plaintiff receive leave to amend pleadings after an answer has been filed, will have little if any meaning at all. The ramifications of the Eleventh Circuit's decision could be vast if left unaltered.

CONCLUSION

The case at bar presents a question of exceptional importance: whether 49 U.S.C. § 14501(c) expressly and manifestly preempts the authority of municipalities to regulate all aspects of the towing industry, other than the

price of nonconsensual tows. The resolution of this question by the Court would have a profound effect across the country, from state to state and city to city. The present case is not merely about the safety and insurance regulation of the entire U.S. towing industry; it is about the express manifestation of Congressional intent and the encroachment of the judiciary into matters traditionally resolved by Congress.

Petitioner respectfully requests this Honorable Court to grant its Petition for Writ of Certiorari and hear its appeal of error.

This the 21 day of January, 1999.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-9174

D. C. Docket No. 1:92-CV-658-ODE

R. MAYER OF ATLANTA, INC.,
TONY N. UPCHURCH, d.b.a.
Chuck's Truck, et al.,

Plaintiffs-Appellants,

versus

CITY OF ATLANTA, Georgia,
ELDRIN BELL, Individually and in
his official capacity as Director
of Public Safety for the City of
Atlanta, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(October 23, 1998)

Before EDMONDSON and BIRCH, Circuit Judges, and STAFFORD*, District Judge.

BIRCH, Circuit Judge:

In this appeal, we determine, as a matter of first impression, whether the Interstate Commerce Act

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* Honorable William Stafford, Senior U.S. District Judge for the Northern District of Florida, sitting by designation.

("ICA") preempts a municipal ordinance regulating the provision of consensual towing services. On summary judgment, the district court ruled that, because consensual towing services do not fall within the scope of the ICA's preemption provision, the municipal ordinance is valid. For the reasons set forth below, we conclude that the ICA expressly preempts municipal ordinances that regulate consensual towing, and that the ICA does not exempt municipal ordinances that address safety and insurance requirements. We therefore vacate the district court's order and remand for further proceedings.

I. BACKGROUND

Appellants (collectively, the "Towing Companies") are the owners and operators of five towing and recovery companies located outside the municipal boundaries of the City of Atlanta. The Towing Companies provide towing services within the Atlanta municipal limits.

In 1977, the Atlanta City Council adopted several ordinances governing the provision of towing services within city limits. One ordinance in particular makes it unlawful for "any person . . . to use or operate upon any of the streets of the city a wrecker . . . without having obtained a license granted by the mayor as provided in this section." City of Atlanta Code of Ordinances § 162-223(a).[1] In order to obtain a license from the mayor,

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[1] In 1995, the City Council made minor stylistic alterations to, and renumbered the code section of, the ordinance at issue in this case. R3-54 Exs. A & B. Although the conduct underlying the Towing Companies' claims occurred prior to the

an applicant must provide: (a) his name and address; (b) his place of business; (c) the nature and character of his business; (d) the names of his partners, if any; (e) the names of all officers, if the applicant is a corporation; (f) a list of the charges to be imposed for the towing services to be provided by the applicant; (g) a description of the type and amount of insurance held by the applicant; and (h) such other information as required by the police or the license review board. *Id.* § 162-223(b). The same ordinance also makes it unlawful for "any person . . . to use or to operate upon any of the streets of the city any wrecker without having first filed a registration of all these vehicles with the department of police." *Id.* § 162-223(c). In order to be registered with the police, an applicant must provide: (a) the make, model and manufacturer's number of the towing vehicle; (b) the date the vehicle was put into use as a wrecker; (c) the driver's license numbers of those who will operate the vehicle; (d) the names of insurance companies providing liability coverage for the vehicle; (e) the permit number of each person who will operate the vehicle; and (f) such other information that may be required by the mayor or the mayor's designee. *Id.*

Between October 26, 1990, and May 18, 1992, Atlanta law enforcement officers issued citations to the Towing Companies because they operated tow trucks within the city limits without obtaining the permits required by § 126-223(a) and without registering with the police as required by § 126-223(c). R3-54 Exs. C, D, E, & F. All of

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renumbering of the code sections, we will refer to the current section of the code in order to minimize confusion.

the citations involved "consensual tows," which occur when the owner of a vehicle expressly requests towing services to be provided by a specific towing company and enters a private contract with the towing company for the services.[2] All but one of the citations resulted in convictions, requiring the Towing Companies to pay $276 each in fines.

In March 1992, the Towing Companies initiated this action in federal court, seeking declaratory and injunctive relief to bar further enforcement of Atlanta's towing ordinances. The Towing Companies also claimed compensatory damages related to their convictions.

On August 23, 1994, Congress enacted the Federal Aviation Administration Authorization Act of 1994 ("FAAA Act"), which became codified as part of the ICA effective January 1, 1995. P.L. No. 103-305, 108 Stat. 1569, 1607 (1994). Section 601 of the FAAA Act amended the ICA to preempt a wide range of state and local statutes and regulations governing intrastate motor carriage. Section 601 created a "general rule" that:

> a State, [or] a political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

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[2] "Nonconsensual" towing services occur when law enforcement or other local authorities determine that a vehicle must be towed and the owner of the vehicle is not afforded the opportunity to request towing services from a specific company. An example of a nonconsensual tow arises when an abandoned car is impounded by police.

49 U.S.C.A. § 11501(h) (1995).[3] The FAAA Act also created exceptions to the general preemption rule to authorize state regulations that, among other things, regulate safety, impose highway route controls, limit the size and weight of a motor vehicle or the hazardous nature of its cargo, and require mandatory levels of insurance. 49 U.S.C.A. § 11501(h)(2) & (3) (1995). None of the exceptions, however, concerned towing services.

On December 29, 1995, Congress passed the Interstate Commerce Commission Termination Act ("ICCTA") of 1995, which took effect on January 1, 1996. P.L. No. 104-88, 109 Stat. 803, 804. Section 103 of the ICCTA recodified former § 11501(h) as 49 U.S.C. § 14501(c)(1) without altering the provision's "general rule" preempting the state and local regulation of prices, routes, and services provided by motor carriers that transport property. *Id.*, 109 Stat. at 899. The ICCTA, however, added a new exception to the general rule created by § 14501(c)(1):

> [Section 14501(c)(1)] does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

49 U.S.C. § 14501(c)(2)(C).

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[3] As described below, this provision now is codified at 49 U.S.C. § 14501(c)(1).

Relying upon these additions to the ICA's preemption provision, the Towing Companies argued that, although municipalities validly may regulate the prices charged for "nonconsensual" towing services, the regulation of consensual towing services is expressly preempted by § 14501(c)(2)(C). The district court rejected this argument, concluding that Atlanta's towing ordinance passes muster under the Supremacy Clause. The Towing Companies appeal this ruling.[4]

II. DISCUSSION

When reviewing a district court's analysis of a claim that federal law preempts state law, we apply the same legal standards that the district court applied in its order awarding summary judgment. *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1498 (11th Cir.), *cert. granted*, ___ U.S. ___, 118 S. Ct. 439, 139 L. Ed. 2d 337 (1997), *cert. dismissed*, ___ U.S. ___, 118 S. Ct. 1793, 140 L. Ed. 2d 933 (1998). We therefore review the district court's decision *de novo*. *Id.*

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[4] In their Complaint, the Towing Companies claimed that the towing ordinance (a) violates the Commerce and Due Process Clauses of the United States Constitution, (b) is preempted by state law, and (c) tortiously interfered with the Towing Companies' contracts. The Towing Companies raised their federal preemption claim in the context of the parties' cross-motions for summary judgment. In addition to the dismissal of their federal preemption claim, the Towing Companies also appeal the dismissal of their Commerce Clause and due process claims. Because we find the federal preemption claim to be dispositive, we need not consider the Commerce Clause and due process claims raised on appeal.

A. PREEMPTION PRINCIPLES

The Supremacy Clause of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992). Although at issue here is the validity of a municipal ordinance, rather than a state statute, "for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605, 111 S. Ct. 2476, 2482, 115 L. Ed. 2d 532 (1991) (quoting *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 712-14, 105 S. Ct. 2371, 2375, 85 L. Ed. 2d 714 (1985)).

Statutes and regulations established under the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress. *Lewis*, 107 F.3d at 1500. Whether a federal statute preempts state law is "a question of congressional intent." *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 767 (11th Cir. 1998) (internal quotation marks omitted).

Federal law preempts state and local laws in three distinct ways: (1) "express preemption," in which Congress defines explicitly the extent to which a federal statute preempts state law; (2) "field preemption," in which state law is preempted because "Congress has regulated a field so pervasively, or federal law touches on

a field implicating such a dominant federal interest, that an intent for federal law to occupy the field exclusively may be inferred;" and (3) "conflict preemption," in which state law "is preempted by implication because state and federal law actually conflict, so that it is impossible to comply with both, or state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Lewis*, 107 F.3d at 1500 (internal quotation and citation omitted).

Here, the Towing Companies limit their arguments to express preemption, which is a wise choice. No comprehensive federal regulatory scheme purports to regulate vehicle towing, and Atlanta's towing ordinance does not conflict with, or stand as an obstacle to the accomplishment and execution of, the full purposes and objectives of Congress. We therefore need consider only whether federal law expressly preempts the City's towing ordinance.

B. EXPRESS PREEMPTION UNDER 49 U.S.C. § 14501(c)(1)

Express preemptive language may be found within the statute itself, in its legislative history, or in regulations promulgated pursuant to the statute. *Scurlock v. City of Lynn Haven*, 858 F.2d 1521, 1523 (11th Cir. 1988). Because the fundamental question is one of statutory intent, we begin our analysis with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose. *Morales v. Trans World Airlines*, 504 U.S. 374, 383, 112 S. Ct. 2031, 2036 (1992).

The preemption clause enacted in the ICCTA states:

> **General Rule.** – Except as provided in paragraphs (2) and (3), a State, [or a] political subdivision of a State, . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.

49 U.S.C. § 14501(c)(1). A "motor carrier" is defined as "a person providing motor vehicle transportation for compensation." 49 U.S.C.A. § 13102(12). Motor vehicle transportation by a tow truck for the compensation of the tow truck company, which is at issue in this case, places the towing companies within the definition of a "motor carrier." Consequently, under the plain, ordinary meaning of the terms used in § 14501(c)(1), the federal statute expressly preempts state and municipal ordinances that regulate the prices, routes, or services provided by towing companies.

This conclusion is strengthened by Congress' addition of a limited exemption to § 14501(c)(1)'s preemptive scope for nonconsensual towing services. Section 14501(c)(2)(C) states that § 14501(c)(1) does not apply to the authority of a state or a political subdivision to enact or enforce an ordinance relating to the price of towing services "if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle." § 14501(c)(2)(C). If Congress had not intended for § 14501(c)(1) to preempt state and local regulation of towing services generally, Congress would not have included an express exemption that applies solely to the prices charged for nonconsensual towing

services. *Cf. United States v. Smith*, 499 U.S. 160, 167, 111 S. Ct. 1180, 1185 (1991) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (internal quotation and citation omitted). By including an express exemption for the regulation of prices for nonconsensual towing services, Congress has evinced its intent that all aspects of consensual towing services remain subject to the general rule set forth in the preemption clause.

Defendants-Appellees (the "City Defendants") argue that this interpretation of Congress' preemptive intent is inconsistent with 49 U.S.C. § 13506(b), which lists several narrowly defined exceptions to the ICA's general grant of jurisdiction to the Secretary of Transportation and the Surface Transportation Board. Section 13506(b) provides that:

> [e]xcept to the extent the Secretary or Board, as applicable, finds it necessary to exercise jurisdiction to carry out the transportation policy of section 13101, neither the Secretary nor the Board has jurisdiction under this part over –
>
> (1) transportation provided entirely in a municipality . . . [or]
>
> (3) the emergency towing of an accidentally wrecked or disabled motor vehicle.

§ 13506(b)(1) & (3). According to the City Defendants, the sections quoted above limit the preemptive effect of § 14501(c)(1) to the extent that Atlanta's towing ordinance regulates transportation that is (a) provided entirely within city limits or (b) related to the emergency towing of disabled vehicles.

Although several courts have adopted the City Defendants' argument, these courts rendered their decisions prior to the effective date of the ICCTA in 1996. *See Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1158 n.4 (6th Cir. 1993) (interpreting § 13506(b) and § 11501(h), which did not contain the exemption for nonconsensual towing, to reflect an intent not to preempt local towing ordinances); *Giddens v. City of Shreveport*, 901 F. Supp. 1170, 1183 (W.D. La. 1995) (same); *426 Bloomfield Ave. Corp. v. City of Newark*, 904 F. Supp. 364, 369-70 (D.N.J. 1995) (same). Cases published after the effective date of the ICCTA have rejected this argument by focusing attention upon the express reference to nonconsensual towing services contained in the amended form of § 14501(c)(2)(C). *See, e.g., Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F. Supp. 711, 722 (S.D. Texas 1996) ("The addition of § 14501(c)(2)(C) confirms congressional intent in § 14501(c)(1) to preempt state and local towing regulations."); *Ace Auto Body & Towing, Ltd. v. City of New York*, No. 96-Civ.-6547(DLC), (S.D.N.Y. Oct. 28, 1997) ("There is little doubt that Congress has expressly preempted the intrastate towing industry from local regulation through Section 14501(c) of Title VI."). We agree with the reasoning of the *Harris County* and *Ace Auto Body* courts in that the express reference to towing services in § 14501(c)(2)(C) provides conclusive evidence that Congress intended to extend the general rule of preemption to those aspects of the towing industry that are not listed within the exception.

Furthermore, we note that, although § 13506(b) restricts the Secretary's and the Board's jurisdiction in

several narrowly defined contexts, § 13506(b) also permits the Secretary and the Board to exercise jurisdiction when "necessary . . . to carry out the transportation policy of [49 U.S.C. §] 13101." § 13506(b). The transportation policy of § 13101 is defined broadly to include the regulation of transportation by motor carriers and the promotion of "competitive and efficient transportation services." § 13101(a)(2). More specifically, the policy calls upon the federal government to, among other things:

> (a) encourage fair competition, and reasonable rates for transportation by motor carriers of property;
>
> (b) promote efficiency in the motor carrier transportation system . . . ;
>
> (c) meet the needs of shippers, receivers, passengers, and consumers; [and]
>
> (d) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public.

§ 13101(a)(2)(A)-(D). One of the ways in which Congress has undertaken to accomplish the policies and goals set forth in § 13101 is by deregulating certain components of the transportation industry, as revealed by express preemption provisions such as § 14501(c)(1). In other words, §§ 14501(c)(1) & (2) reflect Congress' determination that state and local regulation of the towing industry – with the narrow exception of regulations for the price of nonconsensual towing services – disturbs the development of competitive and efficient transportation services. We therefore conclude that enforcement of § 14501(c)(1) in the context of this case does not contravene § 13506(b),

because the exercise of jurisdiction is necessary to accomplish the policy objectives set forth in § 13101.

Even if we assume that the simultaneous application of §§ 14501(c)(1) and 13506(b) creates an apparent inconsistency, any ambiguity regarding Congress' intent is readily resolved by examining the ICCTA's legislative history. The House Report accompanying the proposed version of § 14501(c)(2)(C) states that the purpose behind the amendment is to:

> provide[ ] a new exemption from the preemption of State regulation of intrastate transportation relating to the price of non-consensual tow truck services. This is only intended to permit States or political subdivisions thereof to set maximum prices for non-consensual tows, *and is not intended to permit re-regulation of any other aspect of tow truck operations.*

H.R.Rep. No. 104-311, at 119-20 (1995) (emphasis added), *reprinted in* 1996 U.S.C.C.A.N. 793, 831-32. Congress thus limited the exception to include only those regulations that address the prices of nonconsensual towing, while leaving undisturbed the preemptive effect of the statute as it pertains to all other aspects of the towing industry. As noted prior to the amendment's passage, "[t]he pending legislation would restore the local authority to engage in regulating the prices charged by tow trucks in nonconsensual towing situations. Regulation of routes and services, *as well as regulation of consensual towing*, would still be preempted." 141 Cong. Rec. H15602 (1995) (statement of Rep. Rahall) (emphasis added). The legislative history thus reveals Congress' intent to preempt any State

or local ordinance that regulates the provision of consensual towing services.

For these reasons, we conclude that § 14501(c)(1) expressly preempts municipal ordinances that are "related to" the price, route, or provision of consensual towing services. Sections 162-223(a)-(c) of Atlanta's Municipal Code is "related to"[5] the provision of consensual towing services because the ordinances limit who is permitted to provide the services and requires that individuals and companies satisfy various criteria before they provide the services. Sections 162-223(a)-(c) therefore is preempted under § 14501(c)(1).

C. EXCEPTIONS TO 49 U.S.C. § 14501(c)(1)

The City Defendants argue that, even if §§ 162-223(a)-(c) are preempted under § 14501(c)(1), the

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[5] Congress used identical language in a similar provision found in the Airline Deregulation Act of 1978, now codified at 49 U.S.C. § 41713(b), and expressed an intent that § 14501(c)(1) and § 41713(b) "function in the exact same manner with respect to [their] preemptive effects." H.R. Conf. Rep. No. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757. In *Morales v. Trans World Airlines, Incorporated*, 504 U.S. 374, 112 S.Ct. 2031 (1992), the Supreme Court held that the "related to" language contained in § 41713(b) results in preemption of any state or local law that has a "connection with or reference to" airline rates, routes, or services. 504 U.S. at 384, 112 S.Ct. at 2037 (applying 49 U.S.C. § 1305(a), the precursor to § 41713(b)). Consequently, § 14501(c)(1) preempts a state or municipal ordinance to the extent that the ordinance has a "connection with or reference to" the price, routes, or provision of consensual towing services.

ordinances nonetheless are valid under an exception designed to allow states to regulate motor vehicle safety and to enact minimum insurance requirements. Section 14501(c)(2)(A) excepts from the preemptive scope of § 14501(c)(1) "the safety regulatory authority of a State with respect to motor vehicles" and "the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." § 14501(c)(2)(A). The exception thus authorizes a "State" to enact safety and insurance-related regulations, but is conspicuously silent regarding the authority of a municipality or any other political subdivision of a state to enact such regulations. The Act itself defines the term "State" to "mean[ ] the 50 States of the United States and the District of Columbia," and therefore provides no justification for reading the term "State" to include its political subdivisions. 49 U.S.C. § 13102(18). To support their argument, the City Defendants rely on Harris County, in which the court construed § 14501(c)(2)(A) to permit a municipality to enact safety regulations if the state expressly has delegated its regulatory authority to its political subdivisions. *Harris County*, 943 F. Supp. at 726-27; *see also AJ's Wrecker Serv., Inc. v. City of Dallas*, Nos. Civ. A. 3:97-CV-1311D, Civ. A. 3:97-CV-2398D 1998 (N.D.Tex. April 15, 1998) (construing § 14501(c)(2)(A) in the same manner as *Harris County*).

We are unpersuaded by this argument for four reasons. First, the argument ignores the presumption that, when Congress omits certain language in a particular subsection of a statute and includes the language in other subsections, the omission is intentional rather than accidental. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537,

114 S. Ct. 1757, 1761, 128 L. Ed. 2d 556 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (internal quotation marks omitted). The statute at issue here presents a particularly appropriate opportunity to apply this interpretive rule, as § 14501 contains no fewer than seven express references to the regulatory authority of the political subdivisions of the states in its other subsections, §§ 14501(a), 14501(b), 14501(c)(1), 14501(c)(2)(C), 14501(c)(3)(A), 14501(c)(3)(B), and 14501(c)(3)(C), but omits any references to political subdivisions in § 14501(c)(2)(A). In fact, § 14501(c)(2)(A) is the *only* subsection of the statute that mentions the regulatory authority of a state *without* also mentioning the regulatory authority of the state's political subdivisions. We find it unlikely that this omission reflects a drafting error, because a similar preemption provision contained in the Airline Deregulation Act, 49 U.S.C. § 41713(b)(4)(B)(i), contains the same omission. For these reasons, we view Congress' omission of a reference to a state's political subdivisions from § 14501(c)(2)(A) as a manifestation of Congress' intent that municipal safety and insurance regulations are not exempted from the preemptive scope of § 14501(c)(1).

Second, this interpretation is consistent with the policy objectives underlying the ICCTA. As stated above, the ICCTA is the product of Congress' desire to foster increased competition in the motor transportation industry. To achieve this end, Congress identified a need to eliminate a tangled web of state and local ordinances that

regulated the transportation of property, as evidenced in the conference report accompanying the ICCTA:

> [T]he conferees believe preemption legislation is in the public interest as well as necessary to facilitate interstate commerce. State economic regulation of motor carrier operations causes significant inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology and curtails the expansion of markets. . . . The sheer diversity of these regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.

H.R. Conf. Rep. 103-677, at 87 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1759. By withholding the authority to enact safety and insurance regulations from political subdivisions, Congress ensured that counties and municipalities would not enact differing (and perhaps inconsistent) sets of safety and insurance ordinances. Stated differently, it is reasonable to assume that Congress decided that safety and insurance ordinances must be enacted on a statewide level, in order to minimize the disturbance to the motor transportation industry that a patchwork of local ordinances inevitably would create.[6]

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[6] For example, a tow truck providing consensual towing services from a location in downtown Atlanta to a location in Northwest Georgia may pass through nearly a dozen political subdivisions of the State of Georgia that, under the City Defendants' reading of the statute, would possess the authority to enact safety and insurance regulations for tow truck companies. The number of political subdivisions rises dramatically in situations where the towing services originate in Atlanta and end in North Florida, as is the case for at least one

Third, we are not persuaded by the City Defendants' arguments that the Supreme Court's decision in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991), compels a contrary conclusion. The respondent in *Mortier* argued that, because the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), *codified at* 7 U.S.C. § 136 *et seq.*, contains a provision that expressly authorizes a "State" to regulate pesticides under certain conditions but does not mention political subdivisions, the provision preempts local regulation of pesticides. 501 U.S. at 606-07, 111 S. Ct. at 2482-83; *see also* 7 U.S.C. § 136v (FIFRA's preemption provision). The *Mortier* Court observed that, under FIFRA, the term "State" is not "self-limiting" because "political subdivisions are merely subordinate components" of the state itself. 501 U.S. at 612, 111 S. Ct. at 2485. Since "the exclusion of political subdivisions cannot be

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of the Towing Companies that instituted this action. The cost for a towing company to maintain compliance with all these political subdivisions' ordinances would add up quickly, resulting in the "inefficiencies, increased costs, reduction of competition, inhibition of innovation and technology" that Congress sought to eliminate by enacting the ICCTA. H.R. Conf. Rep. 103-677, at 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1759. In addition, if each political subdivision required tow trucks to display some type of registration number or permit, compliance with all of the ordinances might become a physical impossibility as the number of permits outpaced the available space on the truck. By requiring that safety and insurance ordinances must be enacted on a statewide basis, the costs associated with complying with the ordinances are reduced dramatically, which is an outcome that is consistent with the policy objectives of the ICCTA.

inferred from the express authorization to the 'State[s],' " the Court observed that "the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Id.* at 608, 111 S. Ct. at 2483.

Mortier, however, falls short of establishing a rule that the word "state" must be interpreted to include political subdivisions in all circumstances. Significantly, the provision interpreted in *Mortier* includes no references to political subdivisions whatsoever, and FIFRA as a whole contains only "scattered mention" of political subdivisions in its other parts. *See Mortier*, 501 U.S. at 612, 111 S. Ct. at 2485; 7 U.S.C. § 136v. Moreover, the Court found FIFRA's legislative history to be too "complex and ambiguous" to support a contrary result. 501 U.S. at 612, 111 S. Ct. at 2485. Section 14501, on the other hand, contains no fewer than seven subsections that expressly preclude or authorize rulemaking by political subdivisions, while the subsection at issue in this case conspicuously omits any reference to political subdivisions. *See United States v. Denver*, 100 F.3d 1509, 1513 (10th Cir. 1996) (declining to interpret CERCLA's preemption clause to encompass political subdivisions despite *Mortier* when surrounding statutory language permits inference that "[i]f Congress had wished to include local zoning ordinances within the definition of "state law" it would surely have so stated"); *see also Ohio Mfr. Ass'n v. City of Akron*, 801 F.2d 824, 829 (6th Cir. 1986) (listing federal preemption statutes that include the term "political subdivisions" and concluding that Congress "did not simply

overlook including political subdivisions" in the Occupational Safety Act's preemption provision). Furthermore, as we stated above, our conclusion is consistent with the ICCTA's legislative history.[7] *Cf. Denver,* 100 F.3d at 1513 ("[w]e will not apply *Mortier* in this context when to do so would produce a result so contrary to the overall objectives of CERCLA as expressed consistently in the Act itself, as well as its legislative history"). For these reasons, *Mortier* can be distinguished on its facts, and its construction of the word "State" need not govern our analysis.

Fourth, we are not persuaded by the *Harris County* court's observation that interpreting § 14501(c)(2)(A) in a way that preempts municipal safety ordinances would

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[7] It is worth observing that the context in which the Mortier Court interpreted the term "State" may have influenced the Court's conclusion as well. In Mortier, the Court faced a claim that the use of the word "State" without mentioning political subdivisions revealed Congress' "clear and manifest purpose" to preempt local regulation. In response, the Court held that Congress' silence concerning political subdivisions is not sufficient to satisfy this rigorous standard. 501 U.S. at 608-09, 612, 111 S.Ct. at 2483-85. Section 14501(c)(1), on the other hand, expressly preempts all state and local regulation of certain aspects of the motor transportation industry, and the question we must answer is whether Congress' silence in an exception to this rule implies that political subdivisions are to be included within the exception. The Michigan Supreme Court addressed this distinction when construing an exception to the Federal Railroad Safety Act's preemption clause and concluded that, "[j]ust as the statutory silence in *Mortier* was insufficient to establish preemption in the first place, so the statutory silence here is insufficient to overcome the preemption otherwise expressly mandated by the statute." *Grand Trunk W. R.R. Co. v. City of Fenton,* 482 N.W.2d 706, 709-10 (Mich. 1992).

create an irreconcilable conflict with the preemption provisions contained in the Hazardous Materials Transportation Authorization Act of 1994 ("HTMA Act"), *codified at* 49 U.S.C.A. § 5101 *et seq. See* 943 F.Supp. at 727. Specifically, the HTMA Act permits a "State, political subdivision of a State, or Indian tribe" to enact ordinances governing the routes used by hazardous materials carriers so long as the ordinances are not "inconsistent" with federal standards and laws governing hazardous materials transportation. *See Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1113 (3d Cir. 1985) (holding that municipal law is preempted by what is now codified as 49 U.S.C. § 5125 of the HTMA). It is possible, however, to read § 14501(c)(1) and § 5125 in a way that gives effect to both statutes. *Cf. Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 133, 95 S. Ct. 335, 353, 42 L. Ed. 2d 320 (1974) (two statutes should be read in a manner that gives effect to both unless there exists a "clearly expressed congressional intention to the contrary") (internal quotation and citation omitted). Specifically, § 14501(c)(1) states a "general rule" regarding preemption, which implies that Congress left the door open for any exceptions that are recognized in other parts of the ICA. The HTMA's preemption provision thus may be read as a narrow exception to the general preemptive scope of § 14501(c)(1) that applies to the routing of hazardous materials carriers.[8] This reading comports with

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[8] The scope of this exception to § 14501(c)(1)'s general preemption rule is very narrow indeed, because the HTMA permits a municipality to regulate the routes used by hazardous materials carriers only if the regulations are not "inconsistent" with existing federal regulations. A municipal routing

the interpretive rules set forth in the preceding section, because even though Congress included the term "political subdivisions" in the relevant portions of § 5125, the term is conspicuously absent from other provisions that affect preemption under the HTMA. *See* 49 U.S.C. § 5112(b) (authorizing states and Indian tribes, but not political subdivisions, to designate highway routes over which carriers may transport hazardous materials). Consequently, we do not agree that our construction of § 14501(c)(1) creates an irreconcilable conflict with the preemptive provisions of the HTMA.

For all these reasons, we conclude that §§ 162-223(a)-(c) do not fall within the exceptions for safety and insurance regulations contained in § 14501(c)(2)(A). The ordinances therefore are expressly preempted by § 14501(c)(1).[9]

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regulation is "inconsistent" with federal regulations if it "prohibits or otherwise affects transportation on routes or at locations" authorized by federal regulations. *Jersey Cent. Power*, 772 F.2d at 1113.

[9] The City Defendants argue that, if we conclude that any portion of the towing ordinance is preempted, we should also conclude that these portions are severable from the remaining ordinances that affect towing services. The Towing Companies, however, do not challenge the validity of any ordinances except §§ 162-223(a)-(c), and the Atlanta Code by its terms preserves those parts of its ordinances that are not expressly declared to be invalid by a court of competent jurisdiction. City of Atlanta Code of Ordinances §§ 1-10. Consequently, we need not address the severability of §§ 162-223(a)-(c) from any other parts of the Atlanta Code, and we need not address the validity of any ordinances other than those expressly challenged by the Towing Companies.

III. CONCLUSION

For the foregoing reasons, we conclude that §§ 162-223(a)-(c) of the Atlanta Code of Ordinances are preempted by 49 U.S.C. § 14501(c)(1) and are therefore unenforceable. We therefore VACATE the district judge's entry of summary judgment in favor of the City Defendants with respect to this issue, and REMAND the case to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

R. MAYER OF ATLANTA, INC.; TONY N. UPCHURCH d/b/a CHUCK'S TRUCK; REGINA JENKINS d/b/a JENKINS WRECKER SERVICE CO.; FRED BURT d/b/a QUALITY WRECKER SERVICE; and RANDY UPMAN d/b/a UPMAN'S WRECKER SERVICE,	)	CIVIL ACTION FILE NO.: 1 92-CV-658-HTW
Plaintiffs,	)	
vs.	)	
CITY OF ATLANTA, GEORGIA; ELDRIN BELL, Individually and in his official capacity as Director of Public Safety for the City of Atlanta; Lt. C.T. PADGETT, individually and in his official capacity as a police officer with the City of Atlanta; Officer E. C. JOHNSON, Individually and in his official capacity as a police officer for the City of Atlanta; and Officer BILL GORYCA, individually and in his official capacity as a police officer for the City of Atlanta,	)	
Defendants.	)	

(Filed March 18, 1992)

COMPLAINT

Nature of Action

1.

This is an action challenging the application of Section 14-9003 of the Code of Ordinance for the City of Atlanta (hereinafter referred to as "the License Law") to towing firms and tow truck drivers whose principal places of business are located outside the municipal boundaries of the City of Atlanta and who do not generate 50% or more of their gross income from business within the incorporated area of the City of Atlanta.

2.

As applied to towing firms and tow truck drivers with principal places of business located outside the State of Georgia, the enactment and enforcement of the permit law is violative of the Commerce Clause (Article I, Sec. 8) and the Due Process Clause (Fourteenth Amendment) of the United States Constitution, and Sec. 1 of the Sherman Anti-trust Act.

3.

As applied to towing firms and tow truck drivers with principal businesses located within the State of Georgia but outside the municipal boundaries of the City of Atlanta and generating less than 50% of their gross income from within the City of Atlanta, the enactment and enforcement of the permit law is a violation of due

process, state pre-emption and other pendent state law claims. Including, but not limited to O.C.G.A. § 48-13-10.1 specifically prohibiting any municipality from imposing "any business license fee or occupational tax on any wrecker service unless the wrecker service either maintains its principal office or any branch office within the incorporated area of such municipality or generates 50% of its gross income from business within the incorporated area of such municipality."

4.

There exist no adequate remedy at law for preventing the multiplicity of criminal actions against tow truck drivers and multiplicity of lawsuits that have and will continue to arise from enforcement of this unconstitutional Ordinance and because the Plaintiffs, in the attempted enforcement of this Ordinance, will be harassed in the conduct of their businesses by the arrest of themselves and their employees, the seizure of their vehicles, and the assessment of fines, penalties and potential jail time for the Plaintiffs and their employees. For these reasons Plaintiffs seek declaratory and injunctive relief under Title 28, Sec. 2201 of the United States Code and Rule 65 of the Federal Rules of Civil Procedure.

5.

Plaintiffs are also seeking damages resulting from the deprivation of their rights pursuant to 42 U.S.C. §§ 1983 and 1985 as well as general damages for lost revenue as a result of the Defendants illegal actions.

JURISDICTION AND VENUE

6.

Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1337, 1343 and 2201. Plaintiffs also invoke the pendent jurisdiction of this Court with respect to state law claims.

7.

Venue is proper in this district pursuant to Title 28, Sec. 1391(b) of the United States Code.

PARTIES

8.

The Plaintiff R. MAYER OF ATLANTA, INC. is a Georgia towing and recovery business with its principal place of business located outside the municipal boundaries for the City of Atlanta at 3302 Hardee Avenue. Chamblee, DeKalb County, Georgia 30341. R. MAYER OF ATLANTA, INC. derives less than 50% of its gross income from doing business within the municipal limits of the City of Atlanta.

9.

The Plaintiff TONY N. UPCHURCH owns and operates a business known as CHUCK'S TRUCK located at 2628 Lilac Drive, Morrow, Georgia 30260, outside the municipal limits for the City of Atlanta, Georgia. CHUCK'S TRUCK derives less than 50% of its gross income from doing business within the municipal limits of the City of Atlanta.

10.

The Plaintiff Regina Jenkins owns and operates a business known as JENKINS WRECKER SERVICE CO., located on Covington Highway, Lithonia, DeKalb County, Georgia, outside the municipal limits for the City of Atlanta, Georgia. JENKINS WRECKER SERVICE CO. derives less than 50% of its gross income from doing business within the municipal limits of the City of Atlanta.

11.

The Plaintiff, RANDY UPMAN, d/b/a UPMAN'S WRECKER SERVICE, owns and operates a towing service whose principal place of business is located in Sarasota, Florida.

12.

The Plaintiff FRED BURT d/b/a QUALITY WRECKER SERVICE, owns and operates a towing service whose principle place of business is located in the City of Albany, Georgia.

13.

The Defendant CITY OF ATLANTA is a municipal corporation organized and existing under and by the virtue of the laws of the State of Georgia.

14.

The Defendant ELDRIN BELL is a citizen of the State of Georgia and a resident of the Northern District of Georgia and is sued both individually and in his official capacity as Director of Public Safety for the City of Atlanta.

15.

The Defendant C.T. PADGETT is a citizen of the State of Georgia and a resident of the Northern District of Georgia and is sued both individually and in his capacity as an officer of the City of Atlanta Police Department.

16.

The Defendant BILL GORYCA is a citizen of the State of Georgia and a resident of the Northern District of Georgia and is sued both individually and in his capacity as an officer of the City of Atlanta Police Department.

17.

The Defendant E.C. JOHNSON is a citizen of the State of Georgia and a resident of the Northern District of Georgia and is sued both individually and in his capacity as an officer of the City of Atlanta Police Department.

FACTS OF THE CASE

18.

Section 14-9003 of the Code of Ordinances for the City of Atlanta, Part IV, Chapter 9, Subsection (a) prohibits any tow truck operator or tow truck from operating on the streets of the City of Atlanta without first having been issued a LICENSE for the particular driver as well as a LICENSE for the particular truck engaged in any tow in or travel through the City of Atlanta. Operators and owners can be jailed and fined for violation of this Ordinance. This License Law is applied to towing companies and drivers regardless of the location of their business or the state of origin.

19.

This License Law is applicable to and enforced against operators and owners whose businesses are located outside the State of Georgia.

20.

This License Law is enforced against operators and owners of businesses located outside the municipal limits of the City of Atlanta whose businesses do not derive more than 50% of their income from business within the municipal limits of the City of Atlanta.

21.

This License Law is enforced against towing companies and operators who are merely passing through the City of Atlanta on state or federal highways.

22.

A copy of the Ordinance is attached to this Complaint as Exhibit "A".

23.

The License Law requires owners and operators regardless of the distance of their location from the City of Atlanta to submit to inspections and audits by agents of the City of Atlanta.

24.

This License Law requires towing company owners and operators to submit to unspecified "interrogation" upon demand, Sec. 14-9003(b).

25.

The License Law purports to prohibit consensual arms-length business transactions between out-of-town and out-of-state towing firms and their customers, both residents and non-residents of the City of Atlanta, for non-emergency towing services provided within the City of Atlanta.

26.

The Plaintiff RANDY UPMAN holds a certificate of authority from and is regulated by the Interstate Commerce Commission ("ICC") and regularly engages in interstate commerce between Sarasota, Florida and other States and regularly travels into or through the municipal limits of the City of Atlanta as well as hundreds of other counties and municipalities.

27.

Plaintiffs R. MAYER, INC., JENKINS WRECKER SERVICE CO. and CHUCK'S TRUCK are located within the State of Georgia, but outside of the limits of the City of Atlanta and regularly engage in commerce between points within the State of Georgia and points outside of the State of Georgia and pass through the municipal boundaries of the City of Atlanta, Georgia as well as hundreds of other counties and municipalities.

28.

All towing-motor carriers operating in interstate commerce are subject to the Federal Motor Carriers Safety Regulations (49 CFR 390-399) mandating extensive safety rules for the driver and vehicle operating in interstate commerce.

29.

All towing-motor carriers operating in interstate commerce in non-exempt, non-emergency moves are governed by the Interstate Commerce Act (49 U.S.C. § 10521,

et seq.), and operate under the jurisdiction and regulations of the ICC, including registration, minimum insurance requirements, regulations pertaining to hours of service for the employees and the safety of operation of their maintenance, and tariff fillings.

30.

The legislature of the State of Georgia has neither explicitly nor impliedly granted to the City of Atlanta or any Georgia municipality the authority to regulate fees and licenses for towing services not located within the municipal limits and not deriving at least 50% of its gross income from business within the municipal limits and has in fact specifically prohibited such licensing or fee requirements.

31.

Officers of the City of Atlanta Police Department have on numerous occasions detained and arrested drivers of tow trucks owned by businesses located outside the City of Atlanta for operating within the City of Atlanta without a permit. Many have been arrested simply for driving through the City.

32.

On October 26, 1990, Plaintiff TONY N. UPCHURCH was arrested after being called by the owner of a disabled vehicle to tow the vehicle from within the City of Atlanta.

33.

After appearing in Court and requesting an opportunity to hire a lawyer, Mr. Upchurch was arrested, incarcerated for a period of approximately eight hours and required to make bond.

34.

Both drivers coming from other points in Georgia and drivers coming from points outside of the State of Georgia are subject to arrest without notice and without due process of law.

35.

Tow truck drivers working for the Plaintiffs R. MAYER OF ATLANTA, INC., Regina Jenkins and CHUCK'S TRUCK have been harassed, arrested, convicted and fined for operating within the City of Atlanta without the LICENSE required by the License Law.

36.

The License Law has had and continues to have a stifling and deterring effect upon both interstate and intrastate commerce and trade.

37.

The License Law places an unreasonable burden on interstate commerce by prohibiting the movement of automobiles along state and federal highways through the municipal limits of the City of Atlanta.

38.

Requiring each and every towing operator who might pass through the municipal limits for the City of Atlanta while traveling along state and federal highways is unreasonably burdensome and cost prohibitive and therefore deterrent on interstate commerce.

INTERFERENCE WITH INTERSTATE COMMERCE

39.

The License Law is over broad, and is in direct conflict with the Commerce Clause of the U.S. Constitution, Article I, Sec. VIII because it has application to towing firms located outside the State of Georgia and thereby imposes an impermissible burden on interstate commerce.

40.

The License Law is void as an unconstitutional infringement of federal jurisdiction with regard to the regulation of motor carriers operating in interstate commerce.

41.

The local regulation of interstate tow truck operators by the City of Atlanta is preempted by the United States Constitution, the Interstate Commerce Commission, the Federal Motor Carriers Safety Regulations, and other related federal statutes and regulations pertaining to interstate motor carriers.

42.

There is no legitimate local interest justifying the chilling impact on interstate commerce, since the publicly stated rationale for the local law, the prevention of auto thefts by persons operating tow trucks, bears no rational relationship to the permits as required. The License Laws only true function appears to be a discriminatory protection of City of Atlanta towing businesses from out-of-state competition.

43.

As a direct and proximate result of the Defendants wrongful actions, the Plaintiffs have suffered and will continue to suffer the loss of substantial business earnings and profits. An award of money damages alone will not fully and adequately compensate the Plaintiffs for their losses due to the ongoing continuing nature of the permit law.

44.

Plaintiffs have incurred attorney's fees and expenses with regard to the defense of criminal charges brought under the permit law and in efforts to challenge the permit law and are obligated to pay reasonable attorney's fees for their services in this case on behalf of the Plaintiffs.

45.

Plaintiff's are at risk of arrest, incarceration and prosecution each and every time their business takes them or

one of their employees into or through the City of Atlanta.

DUE PROCESS

46.

The permit law is over broad and violative of the due process clause of the Fourteenth Amendment of the United States Constitution in that it may be enforced against out-of-town towing firms that have no actual knowledge of their duty to obtain a permit nor any reason to know or suspect that they are required to be permitted within each municipality through which they might travel in interstate commerce.

47.

The arrest and prosecution of non-resident tow truck drivers pursuant to the License Law is an unlawful deprivation of their civil rights.

48.

The Defendants have actual or implied knowledge that the requirement is unconstitutional and are acting under color of state law and in bad faith with malicious intent when violating Plaintiffs civil rights under 42 U.S.C. § 1983.

49.

As a direct and proximate result of the Defendants wrongful actions complained of herein, the Plaintiffs

have suffered and will continue to suffer loss of substantial business earnings and profits. An award of money damages alone will not fully and adequately compensate the Plaintiffs for their losses due to the ongoing and continuing nature of the License Law.

50.

The Plaintiffs have engaged the services of attorneys to represent them in connection with criminal charges and challenges to the License Law and are obligated to pay reasonable attorney's fees for service of attorneys herein on behalf of the Plaintiffs.

TORTIOUS INTERFERENCE WITH CONTRACTS

51.

Plaintiffs maintain continuing contracts with the various auto clubs, automotive dealerships and transportation companies located outside the boundaries of the City of Atlanta to provide towing services for vehicles owned or serviced by such auto clubs, dealerships or trucking companies.

52.

Vehicles owned or serviced by such auto clubs, dealership and companies often become disabled or are involved in accidents within the municipal boundaries of the City of Atlanta.

53.

The bad faith arrest and detention by City police officers of non-resident towing firms and towing drivers, who travel intrastate or interstate to or through the City of Atlanta is a tortious interference with contractual relations.

54.

As a direct and proximate result of Defendants wrongful actions complained of herein, the Plaintiffs have suffered and will continue to suffer the loss of substantial business earnings and profits. An award of money damages alone will not fully and adequately compensate the Plaintiffs for their losses due to the ongoing and continuing nature of the permit law.

STATE PEREMPTION

55.

The permit law is in direct conflict with the official code of Georgia, Sec. 48-13-10.1 and other Georgia laws which control and regulate the towing industry within the State of Georgia.

56.

By virtue of the control exercised by the Department of Public Safety, the Department of Transportation and the Public Service Commission over the wrecker industry in Georgia, regulation is preempted by state law and

therefore this municipal attempt is void and unenforceable.

57.

As a direct and proximate result of Defendants wrongful actions complained of herein, Plaintiffs have suffered and will continue to suffer the loss of substantial business earnings and profits.

WHEREFORE, Plaintiffs demand judgment against the Defendants, joint and severally, as follows:

1. That the Court enter a preliminary and permanent injunction prohibiting the Defendants from enforcing the permit law against any towing firm with its principal place of business located outside the municipal boundaries of the City of Atlanta or whose business generates less than 50% of its gross revenue from within the municipal limits of the City of Atlanta;

2. That the Court enter a declaratory judgment declaring the permit law to be unconstitutional, illegal and unenforceable as it purports to apply to towing businesses with principal places of business located outside the City of Atlanta;

3. Damages in an amount sufficient to compensate the Plaintiffs, R. MAYER OF ATLANTA, INC. and Regina Jenkins for losses sustained as a result of the arrest and prosecution of its drivers and its attempts to challenge the permit law, including but not limited to, attorney's fees and costs;

4. Damages in an amount sufficient to compensate the Plaintiff R. MAYER OF ATLANTA, INC. and Regina

Jenkins for business losses sustained as a result of Defendants conduct;

5. Damages in an amount sufficient to compensate the Plaintiff TONY N. UPCHURCH for deprivation of his civil rights, high wrongful arrest and prosecution, attorney's fees, and loss of business opportunities within the City of Atlanta;

6. Damages in an amount sufficient to compensate the Plaintiffs for any actual damages suffered;

7. Attorney's fees and costs;

8. A trial by jury for the legal issues; and

9. For such other and further relief as the court may deem proper.

Respectfully submitted,

THOMAS E. MADDOX, JR., P.C.

/s/ Thomas Maddox
Thomas E. Maddox, Jr.
Georgia Bar No. 465513
Attorney for the Plaintiffs

804 The Grant Building
44 Broad Street, N. W.
Atlanta, Georgia 30303
(404) 523-0088

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

R. MAYER OF ATLANTA, et al.	)	
	)	
Plaintiffs	)	Civil Action File No.
v.	)	1-92-CV-658-HTW
	)	
CITY OF ATLANTA, et al.	)	
	)	
Defendants.	)	

ANSWER

COMES NOW, the Defendants in the above-styled action and answers the Plaintiffs' Complaint as follows:

FIRST DEFENSE

Plaintiffs' Complaint fails to state a claim upon which any relief may be granted against these Defendants and should therefore be dismissed.

SECOND DEFENSE

The Defendants' actions were neither arbitrary or capricious, nor an abuse of discretion, nor taken in violation of the Constitution of the United States or of the laws of the State of Georgia.

THIRD DEFENSE

All actions taken by Defendants were pursuant to the City of Atlanta's Code of Ordinances, and the laws and constitution of the State of Georgia and the United States.

FOURTH DEFENSE

The Defendants have not subjected the Plaintiffs to the deprivation of any rights, privileges, or immunities secured by the constitution or laws of the United States or the State of Georgia.

FIFTH DEFENSE

At all times relevant to the Complaint in this case, the Defendants engaged in no ordinance, rule, regulation, custom, policy, pattern or practice which gave rise to any violation of any right guaranteed to the Plaintiffs in this case.

SIXTH DEFENSE

Defendants have not conspired with each other or others to subject the Plaintiffs to the deprivation of any rights, privileges, or immunities secured by the constitution or laws of the United States or the State of Georgia.

SEVENTH DEFENSE

The individual Defendants herein are entitled to qualified immunity from any liability resulting from the causes of action alleged in the Plaintiffs' Complaint, Defendant expressly denying any liability as alleged in the Complaint.

EIGHTH DEFENSE

The Defendants Bell, Padgett, Johnson and Goryea are not subject to suit in their individual capacity for the conduct alleged in the Complaint.

NINTH DEFENSE

The Plaintiffs have effectuated improper service upon the Defendants in this case and thus this Court is without jurisdiction to hear this action.

TENTH DEFENSE

Without waiving the above defenses, the Defendants respond to the specific allegations of the Complaint as follows:

1.

The Defendants admit the allegations contained in paragraphs 7, 13, 28 and 29, of the Plaintiffs' Complaint.

2.

The Defendants deny the allegations, as they are written, of paragraphs 2, 3, 4, 5, 14, 15, 16, 17, 18, 20, 21, 23, 24, 25, 30, 31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 53, 54, 55, 56 and 57 of the Plaintiffs' Complaint.

3.

The Defendants are without sufficient knowledge or information to admit or deny the allegations of paragraphs 1, 6, 8, 9, 10, 11, 12, 19, 22, 26, 27, 32, 33, 44, 50, 51, and 52, of the Plaintiffs' Complaint and therefore denies the allegations of these paragraphs.

While Plaintiff's prayer for relief requires no response, the Defendants state that the Plaintiffs are entitled to no relief whatsoever.

WHEREFORE, the Defendants respectfully request that the Plaintiffs' Complaint be dismissed with all costs cast against the Plaintiff.

This 7th day of April, 1992.

Respectfully submitted,

MICHAEL V. COLEMAN,
City Attorney
State Bar No. 177635

/s/ Overtis Hicks Brantley
OVERTIS HICKS BRANTLEY
State Bar No. 351350

/s/ June D. Green
JUNE D. GREEN
State Bar No. 307250

/s/ Charles G. Hicks
CHARLES G. HICKS
State Bar No. 350880

Attorneys for Defendants

Suite 4100
68 Mitchell Street, S.W.
Atlanta, GA 30335-0332
(404) 330-6400

CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing Answer to counsel for Plaintiff, by depositing same in the United States mail with proper postage affixed thereon to ensure delivery, addressed to:

Thomas E. Maddox, Jr. Esq.
804 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303

This 7th day of April, 1992

/s/ Charles G. Hicks
CHARLES G. HICKS

Attorney for Defendants

Suite 4100
68 Mitchell Street, S.W.
Atlanta, Georgia 30335-0332
(404) 330-6400

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

R. MAYER OF ATLANTA, INC.; TONY N. UPCHURCH d/b/a CHUCK'S TRUCK; REGINA JENKINS d/b/a JENKINS WRECKER SERVICE CO.; FRED BURT d/b/a QUALITY WRECKER SERVICE; and RANDY UPMAN d/b/a UPMAN'S WRECKER SERVICE, Plaintiffs, vs. CITY OF ATLANTA, GEORGIA; ELDRIN BELL, Individually and in his official capacity as Director of Public Safety for the City of Atlanta; Lt. C.T. PADGETT, individually and in his official capacity as a police officer with the City of Atlanta; Officer E. C. JOHNSON, Individually and in his official capacity as a police officer for the City of Atlanta; and Officer BILL GORYCA, individually and in his official capacity as a police officer for the City of Atlanta, Defendants.	CIVIL ACTION FILE NO.: 1:92-CV-658-HTW

MOTION TO SUPPLEMENT THE COMPLAINT

(Filed Dec. 19, 1995)

COME NOW PLAINTIFFS IN THE ABOVE ACTION and show this Honorable Court the following:

1.

Since the filing of the Complaint O.C.G.A. § 48-13-10.1 has been repealed.

2.

In August of 1994 the Congress of the United States enacted 49 U.S.C.A. § 11501, thereby preempting any state or local regulation of "any motor carrier with respect to the transportation of property" applicable to towing firms carriers of property.

WHEREFORE Plaintiffs move for leave under F.R.C.P. 15 to amend the Original Complaint by:

a) adding as Paragraph #41A the following:

41A.

On August 23, 1994 the Congress of the United States enacted 49 U.S.C.A. § 11501 thereby preempting any state or local regulation of towing firms or any other motor carrier which transports property.

and

b) deleting that portion of the prayers for relief designated as #1. and substituting in its place the following:

1. That the Court enter an injunction prohibiting the Defendants from enforcing the permit law and any other ordinance purporting to regulate any towing firm with its principal place of business located outside the municipal boundaries of the City of Atlanta.

This 18th day of December, 1995.

Respectfully submitted,

THOMAS E. MADDOX, JR., P.C.

/s/ Thomas E. Maddox, Jr.
Thomas E. Maddox, Jr.
Georgia Bar No. 465513
Attorney for the Plaintiffs

3521 Habersham At Northlake
Tucker, Georgia 30084-4009
(770) 414-8055

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO SUPPLEMENT THE COMPLAINT was mailed, postage prepaid, this 18th day of December, 1995, to the following counsel:

Lisa Steinmetz Morchower, Esq.
Overtis Hicks Brantley, Esquire
Charles G. Hicks, Esquire
68 Mitchell Street, S.W., Suite 4100
Atlanta, Georgia 30335-0332

/s/ Thomas E. Maddox, Jr.
Thomas E. Maddox, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

R. MAYER OF ATLANTA, INC., et al.,	:	
Plaintiffs	:	CIVIL ACTION
vs.	:	1:92-cv-658-HTW
CITY OF ATLANTA, et al.,	:	
Defendants	:	

ORDER OF COURT

(Filed Jan. 13, 1996)

This matter is currently pending before this court on plaintiffs' motion to supplement the complaint.[1]

In support of their motion, plaintiffs contend that (1) the state law under which plaintiffs sought injunctive relief – O.C.G.A. § 48-13-10.1[2] – has been repealed effective January 1, 1995, and (2) a newly enacted federal law, 49 U.S.C.A. § 11501, preempts any state or local regulation of towing firms or other motor carrier which transports property.

In response, defendants argue that § 11501 does not preempt the local law referred to as the "Wrecker Service Ordinance – Section 14-9001 through Section 14-9014 of

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[1] The motion is more appropriately deemed a motion to amend complaint under Fed.R.Civ.P. 15.

[2] This section is entitled "Restriction on authority of counties and municipalities to impose business license fee or occupational tax on wrecker services."

the Atlanta Code of Ordinances.[3] According to defendants, these sections, as well as other laws and the City of Atlanta's general police power, give the City of Atlanta authority to regulate the wrecker industry. Defendants contend that plaintiffs have failed to carry their burden of showing that this authority has been preempted by 49 U.S.C.A. § 11501.

" 'State law is displaced by federal law where (1) Congress expressly preempts state law; (2) Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme; or (3) state law conflicts with federal law or interferes with the achievement of federal objectives.' " *Giddens v. City of Shreveport*, 901 F.Supp. 1170, 1183 (W.D.La. 1995). Plaintiffs neither reference these bases for preemption nor discuss which is/are applicable to the instant case. Nor do plaintiffs describe the language in § 11501 which purportedly preempts otherwise applicable state and local law.

The section cite by defendants and the *Giddens* court, on which plaintiffs appear to rely, relates to the regulatory power of the Interstate Commerce Commission ("ICC"). That section provides as follows:

> a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision . . . related to a price, route or service of any motor carrier . . . with respect to the transportation of property.

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[3] This court agrees with plaintiffs that O.C.G.A. § 48-13-10.1 has been repealed; defendants do not dispute this issue.

49 U.S.C.A. § 11501(h). Defendants contend that, when read in context with other laws that define the ICC's jurisdiction, § 11501 does not preempt the City of Atlanta's regulation of wreckers.

Excepted from the ICC's jurisdiction is " 'transportation provided entirely in a municipality' " and " 'the emergency towing of an accidentally wrecked or disabled vehicle.' " *Giddens*, 901 F.Supp. at 1183 (quoting 49 U.S.C. § 10526(b)). *See also Interstate Towing Ass'n, Inc. v. City of Cincinnati, Ohio*, 6 F.3d 1154, 1158 n.4 (6th Cir. 1993) (Congress did not intend to preempt "local towing services"). Plaintiffs have failed to cite contrary authority or otherwise provide this court with grounds that preemption is appropriate here. Based on the record before this court, it appears that 49 U.S.C.A. § 11501 does not preempt state or local law; thus, plaintiffs have failed to show grounds for leave to amend or supplement their complaint.

Therefore, after due consideration, this court DENIES plaintiffs' motion to supplement the complaint.[4]

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[4] This court also notes that plaintiffs apparently have failed to comply with this court's September 20, 1995 order, in which this court gave the parties twenty (20) days from each party's receipt of that order to file a status report regarding settlement negotiations.

SO ORDERED, this 17th day of January, 1996.[5]

/s/ Horace T. Ward
HORACE T. WARD,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

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[5] As a courtesy to the clerk of court, this court notes that this Order terminates entry no. 40 on the docket sheet.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

R. MAYER OF ATLANTA, INC., TONY N. UPCHURCH d/b/a CHUCK'S TRUCK; REGINA JENKINS d/b/a JENKINS WRECKER SERVICE CO.; FRED BURT d/b/a QUALITY WRECKER SERVICE; and RANDY UPMAN d/b/a UPMAN'S WRECKER SERVICE	:	
vs.	:	CIVIL NO. 1:92-cv-658-ODE
CITY OF ATLANTA, GEORGIA; ELDRIN BELL, Individually and in his official capacity as Director of Public Safety for the City of Atlanta; LT. C. T. PADGETT, individually and in his official capacity as a police officer with the City of Atlanta; OFFICER E. C. JOHNSON, individually and in his official capacity as a police officer for the City of Atlanta; and OFFICER BILL GORYCA, individually and in his official capacity as a police officer for the City of Atlanta	:	

ORDER

(Filed Sep. 28, 1997)

This civil action, in which Plaintiff seeks injunctive relief and compensatory damages pursuant to 42 U.S.C.

§ 1983, is before the court on Defendants' motion for summary judgment, and Plaintiffs' motion for partial summary judgment. The parties have filed responses to the respective motions before the court and these matters are now ready for decision.

This suit involves Plaintiffs' challenge to the provision of the City of Atlanta Code of Ordinances which regulates the licensing of "wreckers" operating within the City of Atlanta, Georgia ("Atlanta" or the "City"). The facts surrounding this controversy are virtually undisputed and may be stated briefly.

The Plaintiffs in this lawsuit are five owners and operators of towing and recovery businesses that are located outside the municipal limits of the City of Atlanta. While four of the named Plaintiffs have principal places of business that are located within the State of Georgia, all four contend that they derive less than 50% of their gross income from doing business in the City of Atlanta. Additionally, one of the named Plaintiffs, Randy Upman d/b/a Upman's Wrecker Service, owns and operates a towing service with a principal place of business in Sarasota, Florida.

Between October 26, 1990 and May 18, 1992, the Plaintiffs and/or their employees were charged with violating §§ 14-9003(a) and/or 14-9003(c) of the City of Atlanta Code or Ordinances ("Wrecker Ordinance").[1] In relevant part, § 14-9003(a) provides:

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[1] In January 1, 1996, the City of Atlanta Code of Ordinances was recodified and new numbers were assigned to each Code Section. Because, however, the recodification did not result in any substantive changes to the provisions relevant to this

> It shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to use or operate upon any of the streets of the city a wrecker as defined in this chapter . . . without having first obtained a license granted by the mayor as provided herein in accordance with O.C.G.A. § 44-1-13.

Similarly, under § 14-9003(c):

> It shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to use or to operate upon any of the streets of the city any wrecker as defined within this chapter without having first filed a registration of all theses vehicles with the bureau of police services. . . .

On May 18, 1992, Plaintiffs filed suit, making as Defendants the City of Atlanta, Eldrin Bell, in his individual and official capacity as Director of Public Safety for the City of Atlanta, C. T. Padgett, Bill Goryca, and E. C. Johnson, in their individual and official capacities as officers of the City of Atlanta Police Department. In their four count complaint, Plaintiffs allege that § 14-9003 is unconstitutional in that it violates the Equal Protection Clause, Due Process Clause, and Commerce Clause of the United States Constitution. Additionally, Plaintiffs contend that the provision constitutes a tortious interference with contracts.[2]

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lawsuit, the court will simply refer to the relevant provisions by their former numbers. Because, however, Plaintiffs concede that § 48-13-10.1.

[2] Plaintiffs also claim that the Wrecker Ordinance violated O.C.G.A. § 48-13-10.1. Because, however, Plaintiffs concede that

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the [Defendants are] entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In ruling on Defendants' motion, the court must view the evidence in a light most favorable to Plaintiff. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). To prevail on their motion for summary judgment, Defendants must show that the evidence is insufficient to establish an essential element of Plaintiffs' case. *Celotex Corp. v. Catrett*, 477 U.S 317, 325 (1986). If Defendants make a sufficient showing, then Plaintiffs "must come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)). If the evidence supporting Plaintiffs' claims is insufficient for a jury to return a Plaintiffs' verdict, or is merely colorable or not significantly probative, then Defendants are entitled to summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). If, however, reasonable minds could differ as to the import of the evidence, and a reasonable interpretation of the evidence could lead to a Plaintiffs' verdict, then summary judgment is inappropriate. *Id.* at 251-52.

With respect to Plaintiffs' claims against the City of Atlanta, because "official capacity suits generally represent only another way of pleading an action against an

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§ 48-13-10.1 has been repealed, this claim is now moot and will not be discussed further.

entity of which an officer is an agent," *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (citations and internal quotations omitted), to the extent that Defendants are sued in their official capacities, the suit is, in essence, a law suit against the City of Atlanta. To establish municipal liability under § 1983, Plaintiffs must demonstrate that the action at issue "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or is "visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision-making channels." *Monell v. City of New York Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978). Additionally, the challenged action must be the "moving force behind the constitutional deprivation before liability will attach." *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1442 (11th Cir. 1985) (citation omitted). Here, Plaintiffs have satisfied these elements, and therefore, the court turns to a discussion of the merits of Plaintiffs' claims.

First, with respect to Plaintiffs' equal protection challenge, "[t]he Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (citations omitted). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a

rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993). In the instant case, the ordinance at issue neither proceeds, along suspect lines nor infringes upon fundamental constitutional rights. Thus, the rational basis standard of review applies.

"[R]ational basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness or logic of legislative choices.' " *Heller v. Doe*, 113 S. Ct. 2637, 2643 (1993) (citations omitted). Rather, "[a] statute is presumed constitutional, and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. . . . ' " *Id.* (citations omitted). Moreover, when creating a classification subject to rational basis review, the legislature "need not 'actually articulate at any time the purpose or rationale supporting its classification.' " *Id.* at 2642 (citations omitted).

Here, Defendant asserts that the Wrecker Ordinance is a legitimate health, safety, and welfare regulation that was adopted for the purpose of protecting citizens and their property in the City of Atlanta. More specifically, Defendant alleges that "there is great potential for unfair business practices and abuse of the public by having unregistered, unlicensed and possibly uninsured towing service vehicles driving unregulated and unchecked through the streets of Atlanta picking up any abandoned or unoccupied car and towing it away or possibly stealing it from an uninformed and unprotected citizen." (Defs.' Br. in Supp. of Summ. J. at 9). According to Defendant, "[t]he regulatory fee exacted from towing and wrecker services is for the purpose of regulating and

restraining the services of wreckers, which is a potentially dangerous business to the public and in need of regulatory compliance with certain disclosure conditions before they can operate on the City streets." (*Id.*)

In an attempt to refute Defendant's assertions, Plaintiffs argue that the City has presented no evidence that automobile theft by tow truck drivers is a problem within the City, or that the Wrecker Ordinance will serve to correct this problem, assuming it exists. Even if the court accepts these assertions as true, and even if Defendant were required to make such a showing, Plaintiffs have, nevertheless, failed to offer any other evidence refuting the myriad of other legitimate purposes that the Wrecker Ordinance was designed to address, including the regulation of unfair business practices and uninsured tow trick drivers. Thus, because Plaintiffs have failed to satisfy their burden of negating every conceivable basis which might support the Wrecker Ordinance, *see Heller*, 113 S. Ct. at 2643 (citations omitted), the court concludes that Plaintiffs' equal protection argument must fail.[3]

Turning to the merits of Plaintiffs' commerce clause challenge Article I, § 8, clause 3, of the United States Constitution grants Congress the authority to "regulate commerce . . . among the several States." The Supreme Court has long recognized, however, that "the 'negative'

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[3] Any due process claim raised by Plaintiffs under the Fourteenth Amendment also fails under this analysis. *See Executive Town & Country Servs. v. City of Atlanta*, 789 F.2d 1523, 1528 (11th Cir. 1986) (dismissing Plaintiffs equal protection claim without discussion after applying rational basis standard of review to plaintiff's due process claim).

or 'dormant' aspect of the Commerce Clause prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.' " *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359 (1992). When evaluating regulatory measures like the one challenged in the instant case, " 'the first step . . . is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.' " *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 853 (1996) (citations omitted).

Here, because the requirements of the Wrecker Ordinance apply equally to both interstate and local businesses, the Ordinance regulates evenhandedly. *Oregon Waste Sys. Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 99 (1994). "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (citation omitted). "[T]he extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

The court has already decided that the Wrecker Ordinance serves legitimate local purposes; thus, the court need not reiterate that discussion here. With respect to the purported burdens imposed on interstate commerce, however, Plaintiffs contend that the Wrecker Ordinance has a direct impact on interstate commerce when applied

to towing businesses that cross interstate lines to tow automobiles either to or from the City of Atlanta. According to Plaintiffs, due to the geographical location of Atlanta, the numerous interstate highways, and the high volume of traffic subject to accident and breakdown, there stands a high degree of probability that the Ordinance at issue will directly interfere with interstate commerce. Aside from this conclusory allegation, Plaintiffs over [sic] no evidence to support their assertion that out-of-state tow truck drivers frequently cross into Georgia to do business in Atlanta.

To rebut Plaintiffs' allegations, Defendant argues that the plain language of the Ordinance applies only to those who use or operate a wrecker upon the streets of the city; thus, by its terms, the Ordinance is inapplicable to those drivers or trucks that are merely passing through Atlanta on an intestate or other highway. Defendant further contends that for those out-of-state drivers that do operate on the streets of the City, the burdens imposed by the Ordinance on interstate commerce are minimal.

In *City of Cincinnati v. Reed*, 500 N.E.2d 333 (Ohio Ct. App. 1985), the Ohio Court of Appeals had occasion to address the constitutionality of a municipal ordinance that required anyone engaged in the towing business to obtain a license from the city treasurer prior to removing parked or disabled automobiles from any location within the city. In upholding the ordinance, the court stated:

> There is not, in our judgment, by intent or effect the sort of pervasive and wide-ranging regulation that would bear directly and routinely upon transportation regularly crossing state lines for a variety of other commercial purposes. We

> have before us, in sum, an activity that appears to be essentially local in character and, therefore, a proper subject of reasonable regulation in the exercise of local police power.

Id. at 336 (footnote omitted). In this court's view, the above quotation is as equally applicable to the instant case. Although the Wrecker Ordinance may impose burdens upon interstate commerce, such burdens are merely incidental, and they are not, as they are required to be in order to violate the Commerce Clause, clearly excessive in relation to the putative local benefits. Consequently, Defendants' motion for summary judgment on Plaintiffs' commerce clause claim is granted.

Next, on January 19, 1996, Senior United States District Judge Horace T. Ward, who was at that time presiding over this case prior to recusing himself, denied Plaintiffs' motion to amend their complaint to add an allegation that 49 U.S.C § 11501 pre-empts the ordinance challenged by Plaintiffs. Plaintiffs, however, contend that they are entitled to summary judgment on the basis of pre-emption, despite Judge Ward's Order denying their motion to amend their complaint. Even if, however, Plaintiffs' pre-emption claim were part of their complaint, the court would grant summary judgment on this claim as well. The court is not convinced that in enacting § 11501, Congress intended to pre-empt all state and municipal statutes and regulations that regulate the towing and recovery industry. *See Giddens v. City of Shreveport*, 901 F. Supp. 1170, 1182-83 W.D. La. 1995) (concluding that 49 U.S.C. § 11501 did not pre-empt local

towing ordinance). Consequently, Plaintiffs' pre-emption claim necessarily fails.[4]

Finally, with respect to Plaintiffs' individual capacity claims against Defendants, the court concludes that the doctrine of qualified immunity dictates dismissal of these claims as well. Under the qualified immunity doctrine, Plaintiffs are required to demonstrate that the actions of Defendants violated clearly established constitutional law. *Lowe v. Aldridge*, 958 F.2d 1565, 1570 (11th Cir. 1992). Moreover, "[t]hat qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their *Individual capacities*." *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (footnote omitted). Here, Plaintiffs have not presented evidence that clearly established constitutional rights were violated. The officers named as Defendants were simply enforcing the Wrecker Ordinance as by law they were required to do. Furthermore, as for Defendant Eldrin Bell, there is no evidence that he violated clearly established law while serving as the Director of Public Safety for the City of Atlanta. Thus, Defendants' motion for summary judgment on Plaintiffs' individual capacity claims is granted.

In accordance with the foregoing, Defendants' motion for summary judgment [#54] is hereby

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[4] The court will dismiss Plaintiffs' tortious interference with contract claim summarily without discussion; Plaintiffs have presented no argument or evidence to survive Defendants' motion for summary judgment on this issue.

GRANTED; Plaintiffs' motion for partial summary judgment [#57] is hereby DENIED; and Defendants' emergency motion to file statement of material facts as a part of Defendants' motion for summary judgment [#63] is hereby MOOT. This action is DISMISSED with prejudice.

SO ORDERED, this 22 day of September, 1997.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

[ENTERED ON DOCKET SEP 24 1997]

49 U.S.C. § 13101

§ 13101. Transportation policy

(a) In general. – To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to oversee the modes of transportation and –

* * *

(2) in overseeing transportation by motor carrier, to promote competitive and efficient transportation services in order to –

(A) encourage fair competition, and reasonable rates for transportation by motor carriers of property;

(B) promote efficiency in the motor carrier transportation system and to require fair and expeditious decisions when required

(C) meet the needs of shippers, receivers, passengers, and consumers;

(D) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public;

(E) allow the most productive use of equipment and energy resources;

(F) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions;

(G) provide and maintain service to small communities and small shippers and intrastate bus services;

(H) provide and maintain commuter bus operations;

(I) improve and maintain a sound, safe, and competitive privately owned motor carrier system;

(J) promote greater participation by minorities in the motor carrier system;

(K) promote intermodal transportation;

* * *

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49 U.S.C. § 13506

§ 13506. Miscellaneous motor carrier transportation exemptions

(b) **Exempt unless otherwise necessary.** – Except to the extent the Secretary or Board, as applicable, finds it necessary to exercise jurisdiction to carry out the transportation policy of section 13101, neither the Secretary nor the Board has jurisdiction under this part over –

(1) transportation provided entirely in a municipality, in contiguous municipalities, or in a zone that is adjacent to, and commercially a part of, the municipality or municipalities, except –

(A) when the transportation is under common control management, or

arrangements for a continuous carriage or shipment to or from a place outside the municipality, municipalities, or zone; or

* * *

(3) the emergency towing of an accidentally wrecked or disabled motor vehicle.

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49 U.S.C.A. Section 14501

§ 14501. Federal authority over intrastate transportation

(a) Motor carriers of passengers. – No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to scheduling of interstate or intrastate transportation (including discontinuance or reduction in the level of service) provided by motor carrier of passengers subject to jurisdiction under subchapter I of chapter 135 of this title on an interstate route or relating to the implementation of any change in the rates for such transportation or for any charter transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This subsection shall not apply to intrastate commuter bus operations.

(b) Freight forwarders and brokers. –

(1) General rule. – Subject to paragraph (2) of this subsection, no State or political subdivision thereof and no intrastate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.

(2) Continuation of Hawaii's authority. – Nothing in this subsection and the amendments made by the Surface Freight Forwarder Deregulation Act of 1986 shall be construed to affect the authority of the State of Hawaii to continue to regulate a motor carrier operating within the State of Hawaii.

(c) Motor carriers of property. –

(1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum

amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

(3) State standard transportation practices. –

(A) Continuation. – Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to –

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

(iv) antitrust immunity for joint line rates or routes, classifications, mileage guides, and pooling, or

(v) antitrust immunity for agent-van line operations (as set forth in section 13907),

if such law, regulation, or provision meets the requirements of subparagraph **(B)**.

(B) Requirements. – A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if –

(i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or a regulation issued by the Secretary or the Board under this part; and

(ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

(C) Election. – Notwithstanding any other provision of law, a carrier affiliated with a direct air carrier through common controlling ownership may elect to be subject to a law, regulation, or provision of a State, political subdivision, or political authority under this paragraph.

(4) Nonapplicability to Hawaii. – This subsection shall not apply with respect to the State of Hawaii.

(Added Pub.L. 104-88, Title I, § 103, Dec. 29, 1995, 109 Stat. 899.)

Official Code of Georgia Annotated Volume 27

36-35-3. Adoption of ordinances, rules, and regulations; amendment of municipal charters by ordinance; amendment of charters and amendment or repeal of ordinances, rules, and regulations by petition and referendum.

(a) The governing authority of each municipal corporation shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which are not inconsistent with the Constitution or any charter provision applicable thereto. Any such charter provision shall remain in force and effect until amended or repealed as provided in subsection (b) of this Code section. This Code section, however, shall not restrict the authority of the General Assembly, by general law, to define this home rule power further or to broaden, limit, or otherwise regulate the exercise thereof. The General Assembly shall not pass any local law to repeal, modify, or supersede any action taken by a municipal governing authority under this Code section, except as authorized under Code Section 36-35-6.

44-1-13. Removal of improperly parked cars or trespassing personal property; procedure; automatic surveillance prohibited; penalty.

(a) Any person entitled to the possession of any parcel or space of private real property shall have the right to remove or cause to be removed from the property any vehicle or trespassing personal property thereon which is not authorized to be at the place where it is

found and to store or cause to be stored such vehicle or trespassing personal property, provided that there shall have been conspicuously posted on the private real property notice that any vehicle or trespassing personal property which is not authorized to be at the place where it is found may be removed at the expense of the owner of the vehicle or trespassing personal property along with information as to where the vehicle or trespassing personal property can be recovered; provided, however, that the owner of private residential property containing not more than four residential units shall not be required to comply with the posting requirements of this subsection.

(b) Only towing and storage firms issued permits by the Public Service Commission pursuant to Title 46, licensed by the local governing authority of the jurisdiction in which they operate, and having a secure impoundment lot shall be permitted to remove vehicles and trespassing personal property from private real property at the request of a person in possession of such private real property made pursuant to subsection (a) of this Code section. The person or firm removing and storing any such vehicle or trespassing personal property shall have a lien against it for the expenses of the removal and storage. The lien may be asserted and enforced and shall be entitled to the same priorities as those of special liens on personalty authorized by Code Section 44-14-363.

* * *

(d) The governing authority of each municipality having towing and storage firms operating within its territorial boundaries may issue a license to engage in private trespass towing pursuant to this Code section to

any firm meeting the qualifications imposed by said governing authority. The fee for the license shall be set by such governing authority. The maximum reasonable costs of removal, relocation, and storage pursuant to the provisions of this Code section shall be compensatory, as such term is used in the public utility rate-making procedures, and shall be established annually by the governing authority of each municipality having towing and storage firms operating within its territorial boundaries; provided, however, that no storage fees shall be charged for the first 24 hour period running from the time the vehicle is removed from the property and no such fees shall be allowed for the removal and storage of vehicles in violation of this Code section.

* * *

Official Code of Georgia Annotated, Volume 34 TITLE 46

PUBLIC UTILITIES AND PUBLIC TRANSPORTATION

CHAPTER 1

GENERAL PROVISIONS

Sec. 46-1-1. Definitions.

As used in this title, the term:

(1) "Carrier" means a person who undertakes the transporting of goods or passengers for compensation.

(2) "Certificate" means a certificate of public convenience and necessity issued by the Public Service Commission pursuant to this title.

(3) "Commission" means the Public Service Commission.

(4) "Company" shall include a corporation, a firm, a partnership, an association, or an individual.

* * *

(6) "For hire" means an activity wherein for compensation a motor vehicle and driver are furnished to a person by another person, acting directly or knowingly and willfully acting with another to provide the combined service of the vehicle and driver, and includes every person acting in concert with, under the control of, or under common control with a motor carrier who shall offer to furnish transportation for compensation.

* * *

(8) "Motor carrier of property" means a motor common or contract carrier engaged in transporting property, except household goods, in intrastate commerce in this state.

(9) "Motor contract carrier and motor common carrier" means as follows:

(A) "Motor contract carrier" means every person, except common carriers, owning, controlling, operating, or managing any motor propelled vehicle including the lessees or trustees of such persons or receivers appointed by any court used in the business of transporting persons or property for hire

over any public highway in this state and not operated exclusively within the corporate limits of any city.

(B) "Motor common carrier" means every person owning, controlling, operating, or managing any motor propelled vehicle, and the lessees, receivers, or trustees of such person, used in the business of transporting for hire of persons or property, or both, otherwise than over permanent rail tracks, on the public highways of Georgia as a common carrier.

(C) Except as otherwise provided in this subparagraph, the terms "motor common carrier" and "motor contract carrier" shall not include:

* * *

(xi) Motor vehicles engaged in the transportation of unmanufactured agricultural products, dairy products, poultry and processed poultry, nursery stock, sod grass, potting soil, pine bark nuggets, dry fertilizer, flue-cured tobacco, soybean meal, pine bark, wood chips, shavings, sawdust, or feedstuff for livestock and poultry, including feedstuff ingredients, provided that such vehicles do no haul or transport other commodities on the same vehicle at the same time not exempt by law from the regulations of the commission; motor vehicles commonly known as tow trucks or wreckers, designed and exclusively used in the business of towing abandoned, disabled, and wrecked vehicles and replacement vehicles therefor or otherwise rendering assistance to abandoned, disabled, and wrecked vehicles; except that any operator of such a vehicle is required to register the exempt operation with the commission, register and identify any of its vehicles, and become subject to the commission's liability insurance and vehicle and hazardous materials safety rules;

* * *

(11) "Permit" means a registration permit issued by the Public Service Commission authorizing interstate transportation for hire exempt from the jurisdiction of the Interstate Commerce Commission or intrastate transportation for hire exempt from the jurisdiction of the Public Service Commission or intrastate transportation by a motor carrier of property.

* * *

(14) "Public highway" means every public street, road, highway; or thoroughfare of any kind in this state.

* * *

(18) "Vehicle" or "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof, determined by the Public Service Commission.

* * *

CITY OF ATLANTA

[SEAL]

OFFICE OF MUNICIPAL CLERK

STATE OF GEORGIA)
) CITY OF ATLANTA
COUNTY OF FULTON)

I, **Rhonda Dauphin Johnson**, do hereby certify that I am the duly appointed **Municipal Clerk** of the City of Atlanta, Georgia, and as such am in charge of keeping the Minutes of the City Council of the said City of Atlanta. I further certify that the attached is a true and correct copy of **Chapter 162; Article IV. Wreckers and Towing Services** as taken from the 1995 Code of Ordinances of the City of Atlanta, Georgia, **ADOPTED by Council December 5, 1995 and APPROVED by the Mayor December 11, 1995.**

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all as the same appears from the original which is of record and on file in my said office.

GIVEN under my hand and seal of office this 15th day of January, 1999.

/s/ Rhonda Dauphin Johnson
Municipal Clerk

ARTICLE IV. WRECKERS AND TOWING SERVICES*

Sec. 162-221. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Wrecker means an automotive vehicle with hoisting apparatus and equipment for towing wrecked or disabled automobiles or other vehicles. The term "wrecker" also includes any vehicle otherwise equipped and used for the purpose of towing wrecked or disabled automobiles or vehicles.

(Code 1977, § 14-9001)

Cross reference – Definitions generally, § 1-2.

Sec. 162-222. Compliance required.

It shall be unlawful for any person, either as principal, agent or employee, to use or operate under any of the streets of the city any wrecker or towing car without complying with this article.

(Code 1977, § 14-9002)

Sec. 162-223. Licensing and registration.

(a) It shall be unlawful for any person, either as principal, agent or employee, to use or operate upon any

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* **State law references** – Abandoned vehicles, O.C.G.A. § 40-11-1 et seq.; restriction on municipal licensing of wreckers, O.C.G.A. § 48-13-10.1.

of the streets of the city a wrecker or to do any trespass towing (as defined in O.C.G.A. § 44-1-13) without having obtained a license granted by the mayor as provided in this section.

(b) Every person desiring to obtain a license required in this section shall make written application to the chief financial officer for that privilege upon forms to be prepared and approved by the police permits section. The application shall state the name and address of the applicant; place where the proposed business is to be located; nature and character of the business to be carried on; if a partnership, the names of the partners; if a corporation, the name of the officers; the charges to be imposed for various services; amounts and types of insurance held; such other information as may be required by the police or license review board; and shall be sworn by the applicant or agent thereof. All applicants shall furnish all data, information and records requested of them by the license review board or the department of police, and failure to furnish this data, information and records within 30 days from the date of the request shall automatically result in the dismissal, with prejudice, of the application. Applicants, by filing an application, agree to produce for oral interrogation any persons requested by the license review board, the department of police or the city attorney and considered as being important in the ascertainment of facts relative to the license. The failure to produce a person within 30 days after being requested to do so shall result in automatic dismissal of the application.

(c) It shall be unlawful for any person, either as principal, agent or employee, to use or to operate upon

any of the streets of the city any wrecker without having first filed a registration of all these vehicles with the department of police upon forms to be furnished by the department. The information for registration shall contain the following:

(1) The make, model and manufacturer's serial number of the vehicle;

(2) Date the vehicle was put into service as a wrecker;

(3) The driver's license number of the owner, if an operator, and of all other operators of the wrecker;

(4) The name of the insurance company with which the owner and all operators have liability insurance coverage with respect to the operation of the vehicle, as required by law;

(5) The permit number of each person who shall drive or operate the vehicle on behalf of the owner; and

(6) Such other information as may be required by the mayor or the mayor's designee.

(d) It shall be unlawful for a person hired by the owner of private property within the city to remove vehicles from any off-street parking facility or to do any trespass towing without having first obtained approval of the department of police for the signs required to be posted on the property as provided by section 16-28.014 and as provided by O.C.G.A. § 44-1-13.

(1) Signs shall be located at each designated entrance to a parking lot or parking area

where parking prohibitions are to be effective. Where there is no designated entrance, such signs shall be erected so as to be clearly visible from each and every parking space.

(2) Such signs shall be 7.5 square feet in area (2.5 feet by three feet).

(3) Such signs located at a designated entrance to a parking lot shall be at least four feet above the site grade. Where there is no designated entrance, such signs shall be six feet above the grade if vehicles are to be parked between the sign and the maneuvering area for the parking space.

(4) Such signs shall state in letters at least three inches high that "unauthorized vehicles may be towed away at owner's expense to. . . . " Such signs shall also include the following information in letters at least $2^1/_2$ inches high:

a. Such vehicles may be removed at a maximum cost of $75.00 and stored at a maximum cost of $5.00 per day to be paid by the owner;

b. The address of the location to which such vehicles are towed;

c. Checks and credit cards shall be accepted in lieu of cash and for no additional fee;

d. No storage fee may be charged if the vehicle has been held less than 24 hours;

e. Shall state that these conditions are required by state law and city ordinances; and

f. Shall state that complaints may be made to the police at 658-6620.

No abbreviations shall be used. The lettering on such signs shall be black on a white, reflective grade background, and shall be illuminated if out of headlight range.

(Code 1977, § 14-9003)

Sec. 162-224. Fees

The annual application fee shall be $120.00 for each truck operated by a wrecker service payable by the wrecker company and $50.00 for each wrecker driver. The annual registration fee shall be $25.00 for the operation of a wrecker service. All registrations shall expire on June 30 of each year and shall be renewed between June 1 and June 30 of each year.

(Code 1977, §§ 14-9004, 19-14.034)

Sec. 162-225. Revocation of license; appeals from order of revocation.

(a) The police chief or the chief's designee may revoke the license to operate a wrecker of any person on any of the following grounds:

(1) If the license to operate was procured by fraudulent conduct or false statement of a material fact;

(2) If the licensee proceeds to the scene of an accident in violation of this article;

(3) If the licensee uses a police radio to obtain information as to the location of the scene of an accident;

(4) If the licensee shall pay in the form of a gratuity any person not interested in an accident for information as to the location of an accident;

(5) If the licensee makes any payment to the owner or one in possession of a parking lot or vacant lot in excess of the reasonable and customary fee ordinarily charged by the owner or person in possession of the parking lot or vacant lot for parking thereon, such payment shall be considered a kick-back;

(6) If the licensee charges fees in excess of those set out in section 162-227 or violates section 162-233; or

(7) If the licensee violates O.C.G.A. § 44-1-13 or any section of this article.

(b) The violation of any three provisions of this article by any owner or by any employee of a wrecker service or company shall result in the automatic revocation of the wrecker service or company's license.

(c) This revocation shall terminate all authority and permission granted by the license to operate issued to the wrecker owner or any person. Any person whose license has been revoked shall not be eligible to again apply for a license for a period of one year from the date of the revocation.

(d) Any person whose license to operate has been revoked by the police chief or the chief's designee may file an appeal to the license review board within 20 days from the date of revocation. The license review board shall have authority, upon the hearing of the appeal, to recommend to the mayor to reverse, vacate or modify the order of a revocation.

(Code 1977, § 14-9005)

Sec. 162-226. Fingerprints; permits.

(a) It shall be unlawful for any person to drive, use or operate upon any of the streets of the city any wrecker without first having been fingerprinted by the department of police and having been issued a permit by the department of police indicating that this person is eligible to use, drive or operate a wrecker.

(b) The department of police shall conduct a complete search relative to any police record of the person fingerprinted. If there is a record of a violation of this article, no permit will be issued and the person shall be ineligible to use, drive or operate a wrecker upon any of the streets of the city; however, any person denied a permit under this section shall have the right of appeal to the license review board.

(c) Any permit issued under this article shall expire as set forth in this subsection unless earlier canceled or revoked by the mayor or the mayor's designee. The mayor or the mayor's designee may prescribe regulations for certifying the eligibility of this person to continue to use, drive or operate a wrecker without the necessity of

this person being again fingerprinted. The annual permit fee shall be $5.00. This permit shall expire on December 31 of the calendar year for which it was effective and shall be renewed between December 1 and December 31 of each calendar year.

(d) The owner of the wrecker shall keep all permits issued under this section in a place so that they may be inspected by any member of the department of police at any time. If the employment of any person possessing this permit is terminated, the permit shall be returned to the person by the owner of the wrecker.

(e) No permit shall be issued to any person who has been convicted in this or any other country within three years immediately prior to the application for this permit of soliciting for prostitution, illegally dealing in narcotics, sex offenses or any other crime involving moral turpitude. Further, this permit shall not be issued to any person who, within the three years immediately preceding the application for this permit has been convicted of three or more moving traffic violations. To be eligible for this permit, the person applying must possess a current driver's license as provided by the laws of the state. Any person denied a permit under this section or any person whose permit may be revoked under this section shall have the right to appeal this denial or revocation to the license review board.

(f) Any basis set forth in subsection (e) of this section for the denial of a permit shall, if it occurs subsequent to issuance of permit, constitute the basis for a revocation of the permit.

(Code 1977, § 14-9011)

Sec. 162-227. Fees charged.

(a) Any towing and storage firm engaged in the business of trespass towing shall not charge the owner of any towed vehicle or personal property in excess of $75.00 for the removal of the vehicle or personal property or in excess of $5.00 per day for storage fees; however, no storage fees shall be charged for the first 24-hour period from the time the vehicle or personal property is removed from the property. The fee of $75.00 shall be all inclusive; no additional fees may be charged for using dollies, trailers, lifts, slim jims or any other equipment or service. However, the maximum fees in this section shall not apply to the trespass towing of vehicles which weigh in excess of two tons.

(b) Trespass towing and storage fees shall be established annually by the council after receiving recommendations from the department of finance based on financial information submitted by the trespass towing firms as to their costs for the removal and storage of vehicles and personal property and on other information. Information shall be submitted by licensees by October 31 of each year.

(Code 1977, § 14-9014)

Sec. 162-228. Lettering on vehicles.

It shall be unlawful for any person, either as principal, agent or employee, to use or operate upon any street of the city any wrecker unless the vehicle shall have lettered on each side in plain view the name of the person owning and causing the wrecker to operate on the streets

of the city, the address from which the wrecker is operating and the telephone number. This lettering shall be in a contrasting color to the color of the wrecker and shall be at least 2½ inches in height.

(Code 1977, § 14-9006)

Sec. 162-229. Service calls.

(a) It shall be unlawful for the owner of any wrecker or the owner's agent, representative or employee to go to any place where an accident has occurred unless called by the driver or the owner of the disabled vehicle or by the owner's authorized representative or employee or to go to the place of a wreck because of information received by police radio.

(b) Prior to towing a vehicle from any site where an accident has occurred, the employee of a wrecker service, both public and private, shall clear the road surface of any broken glass and debris resulting from the accident.

(Code 1977, § 14-9007)

Sec. 162-230. City employees soliciting business.

It shall be unlawful for any city employee to solicit business for any wrecker owner or operator.

(Code 1977, § 14-9008)

Sec. 162-231. Solicitation of towing work.

It shall be unlawful to drive along any street or bridge and solicit towing work. Solicitation of towing

work by the operator or the occupant of a wrecker while parked on any street or bridge is also prohibited. A wrecker operator shall not proceed to the scene of a disabled vehicle without having been requested or notified to do so, as provided in section 162-229.

(Code 1977, § 14-9009)

Sec. 162-232. Notification upon removal of vehicle at request of other than police officer.

The operator of any wrecker removing a private motor vehicle at the request of any person other than a police officer on duty for the department of police shall report to the department of police the fact that the vehicle was removed and its present storage place, together with a description of the vehicle and the tag number. The report shall be made by the wrecker operator by telephonic communication within one hour of the deposit of the vehicle at its storage point.

(Code 1977, § 14-9010)

Sec. 162-233. Impound lot; attendant.

(a) Every person operating a wrecker service within the city shall maintain an impound lot within the city limits, and all vehicles impounded within the city limits shall be delivered to this lot.

(b) Any person operating a wrecker upon the streets of the city and maintaining an impound lot within the city as set forth in subsection (a) of this section shall maintain an attendant at the impound lot 24 hours of

every day, and this attendant shall be clothed with the authority to release any impounded vehicle upon the owner meeting the legal requirements for release.

(c) There shall be posted at the entrance to the impound lot nearest the impound lot office a sign, the minimum size of which shall be 24 inches by 24 inches, painted white with red lettering, stating the towing charge, the storage rate per day, that checks and credit cards shall be accepted in lieu of cash and for no additional fee, that no storage fee may be charged if the vehicle has been held less than 24 hours, that these conditions are required by state law and city ordinance, and that complaints may be made to the police permits section at 658-6620. The location of such sign must be approved by the police permits section as provided by state law.

(d) Lighting shall be provided at a minimum average maintained footcandle value of two on a horizontal plane at the finished surface or grade level.

(e) Upon impoundment of any vehicle by a wrecker service, the wrecker service shall maintain records which shall include the following information:

(1) The date and time the call was received by the wrecker service;

(2) The name of the caller;

(3) The date and time of initial towing;

(4) The place of initial towing;

(5) The date and time of arrival at the impound lot;

(6) The date and time of release to the owner; and

(7) The name of the wrecker driver and helper.

(f) The records required by subsection (e) of this section shall be maintained at a location where affected members of the public may obtain such information by telephone or in person, during regular business hours. Further, all wrecker services, public and private, which impound vehicles shall register with the department of police the current telephone number of the person responsible for releasing the vehicles.

(g) It shall be unlawful for any wrecker service to operate within the city without employing the services of a check approval agency and the major credit card services; and it shall be unlawful to refuse to accept, in lieu of cash, any check which can be insured by a check approval agency, any draft drawn on a credit union which can be insured by a check approval agency or any major credit card for the payment of any and all fees and costs resulting from the towing and storage of the impounded vehicle. For purposes of this subsection, the term "major credit card" means a Visa, Mastercard, American Express, Discovery and Diner's Club card. The municipal clerk shall transmit a copy of this subsection to each wrecker service provider.

(h) The records required by subsection (e) of this section shall be maintained at the impound lot required by subsection (a) of this section and shall be made available for inspection 24 hours a day at the request of the department of police.

(Code 1977, § 14-9012)

Sec. 162-234. Vehicle not towed upon operator returning.

The operator of any wrecker service vehicle summoned to tow away any vehicle, whether on a public street, public property or private property, shall not tow the vehicle away and shall not charge any fee if the operator of the vehicle returns prior to the wrecker vehicle having left the location to which summoned and moves the vehicle immediately and prior to the wrecker vehicle having left the location to which summoned.

(Code 1977, § 14-9013; Ord. No. 1995-35, 6-25-95)

Sec. 150-60. Towing vehicles.

No vehicle shall tow more than one other vehicle nor shall the connection between vehicles exceed 16 feet in length.

(Code 1977, § 13-2293)

CITY OF ATLANTA

[SEAL]

OFFICE OF MUNICIPAL CLERK

STATE OF GEORGIA)
) CITY OF ATLANTA
COUNTY OF FULTON)

I, **Rhonda Dauphin Johnson**, do hereby certify that I am the duly appointed **Municipal Clerk** of the City of Atlanta, Georgia, and as such am in charge of keeping the Minutes of the City Council of the said City of Atlanta. I further certify that the attached is a true and correct copy of **Section 1-102. Powers** as taken from the **Charter of the City of Atlanta, Georgia, ADOPTED by the State Legislature and signed by the Governor April 15, 1996.**

---

all as the same appears from the original which is of record and on file in my said office.

GIVEN under my hand and seal of office this 15th day of January, 1999.

/s/ Rhonda Dauphin Johnson
Municipal Clerk

ARTICLE 1. NAME, POWERS, AND BOUNDARIES

Section 1-102. Powers.

* * *

(b) The city shall have all powers necessary and proper to promote the safety, health, peace, and general welfare of the city and its inhabitants.

(c) The city shall have all powers now vested in the city and now or hereafter granted to municipal corporations by the laws of Georgia and shall have the power to do the following:

* * *

(2) To levy and provide for the collection of license fees and taxes on privileges, occupations, trades, and professions, not in conflict with the general law of this state, and to license and regulate such privileges, occupations, trades, and professions and to provide for the manner and method of payment of such licenses and taxes;

* * *

(17) To regulate or prohibit junk dealers; to regulate and control billiard rooms; to regulate and control pawnshops; to regulate the manufacture, sale, or transportation of intoxicating liquors; to regulate the use and sale of firearms; and to regulate the transportation, storage, and use of combustible, explosive, and inflammable materials, the use of lighting and heating equipment, and any other business or situation which may be dangerous to persons or property;

* * *

(21) To prescribe standards of safety and sanitation and to provide for the enforcement of such standards;

* * *

(29) To define, regulate, and prohibit any act, practice, conduct, or use of property which is detrimental, or likely to be detrimental, to the health, sanitation, cleanliness, welfare, and safety of the inhabitants of the city and to provide for the enforcement of such standards;

* * *

(36) To regulate and license vehicles operated for hire in the city; to limit the number of such vehicles; to require the operators thereof to be licensed; to require public liability insurance on such vehicles in amounts prescribed by ordinance; to regulate and rent parking spaces in public ways for the use of such vehicles; to regulate transportation lines and terminals, pedestrian and vehicle traffic, parking, and common carriers;

* * *

(54) To make, ordain, and establish such bylaws, ordinances, rules, and regulations as shall appear necessary for the security, welfare, convenience, and interest of the city and the inhabitants thereof and for preserving the health, peace, order, and good government of the city;

* * *

(56) To exercise and enjoy all other powers, functions, rights, privileges, and immunities necessary or desirable to promote or protect the safety, health, peace, security, good order, comfort, convenience, morals, and general welfare of the city and its inhabitants; to exercise all implied powers necessary to carry into execution all powers granted in this Charter, as fully and completely as if such powers were fully enumerated herein; to exercise all powers now or in the future authorized to be exercised by other municipal government under the Constitution and general law of the State of Georgia, and to do, perform, and render (or refrain therefrom) all things necessary or convenient to the carrying out of the objects of the powers, duties, and requirements set forth anywhere in this Charter. No enumeration of particular powers in this Charter shall be held to be exclusive of others, nor restrictive of general words and phrases granting powers, but shall be held to be in addition to such powers unless expressly prohibited to cities under the Constitution or applicable public laws;

* * *

(1996 Ga. L. (Act No. 1019), p. 4469; Ord. No. 1996-54, § 1, 7-8-96)

Supreme Court, U.S.
FILED
FEB 22 1999
CLERK

No. 98-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF ATLANTA, *et al.*,

Petitioners,

vs.

R. MAYER OF ATLANTA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent R. Mayer of Atlanta Inc. has no parent company and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

The Petitioners correctly contend that the action brought in the District Court was that the City of Atlanta Wrecker Ordinance, to the extent it applies to towing firms engaged in consensual towing and located outside the corporate limits of the City of Atlanta, is in violation of the Supremacy Clause of the Constitution of the United States of America.

The towing industry practices which were the subject of the action in the District court are correctly characterized as **CONSENSUAL PRIVATE TOWING**- a private agreement between the owner of a vehicle and a towing company for the transport of the vehicle by means of a tow truck (either hooked to or loaded onto the tow truck). This case concerns the transportation of vehicles across local government and state boundaries in non-emergency situations.

Consensual towing may occur in one of four ways relevant to this appeal:

a) A vehicle owner may contract with a towing company to have the towing company pick up a vehicle from a location within the city limits and deliver the vehicle to a location within the city limits.

b) A vehicle owner may contract with a towing company to have the towing company pick up a vehicle from a location within the city limits and deliver the vehicle to a location outside the city limits.

c) A vehicle owner may contract with a towing company to have the towing company pick up a

vehicle from a location outside the city limits and deliver the vehicle to a location within the city limits.

d) A vehicle owner may contract with a towing company to have the towing company pick up a vehicle from a location outside the city limits and deliver the vehicle to a location outside the city limits where the most reasonable rout between pickup and delivery would take the tow truck into the city limits through the city.

This action has not addressed NON CONSENSUAL PRIVATE TRESPASS TOWING- the removal of a vehicle which has been found illegally parked (trespassing) on another's private property. The agreement is between the owner of the property and towing company. The owner of the illegally parked vehicle has not consented to the removal of his vehicle.

This action filed in the District Court did not concern GOVERNMENT CONTRACT OR ROTATION LIST TOWING (Emergency towing)- a private vehicle is disabled or is seized by law enforcement; the law enforcement authority has a contract with a towing company or system by which a towing company is called to remove the vehicle; the owner of the vehicle is unable to choose a towing company or is not allowed to choose; the agreement (contract) is between the government and the towing company; the vehicle owner has not consented to the use of the towing company to remove his vehicle.

None of the Respondents are engaged in "private trespass towing" and none of the citations written against them involve such towing. All of the Respondents are engaged in consensual towing and in every instance from which this case arises the

owner of the vehicle in tow had contracted with the towing company for services.

However, Section 14-9003 of the Code for the City of Atlanta [Atlanta, Ga., Code § 14-9003, "The Ordinance"] (Appellants Exhibit 2) is entitled

> AN ORDINANCE IMPLEMENTING OFFICIAL CODE OF GEORGIA ANNOTATED (O.C.G.A. § 44-1-13) FOR THE PURPOSE OF PROVIDING FOR **PRIVATE PROPERTY TRESPASS TOWING**, ESTABLISHING LICENSING PROCEDURES AND RATES FOR TOWING AND STORAGE FIRMS; AND FOR OTHER PURPOSES.

Most of the provisions of the ordinance in fact concern PRIVATE TRESPASS TOWING and regulations of private trespass towing authorized by O.C.G.A. § 44-1-13. Only *one sentence* in subsection (c) makes it unlawful for ***any person*** to operate a tow truck (wrecker) ***upon any of the streets*** within the City of Atlanta unless in possession of two permits, one for the particular driver and one for the particular wrecker used. According to the testimony of the officers and according to the facts and circumstances of each of the arrests reported by way of affidavit, "operating a wrecker" means either: (1) delivering a vehicle to a location within the City of Atlanta; (2) removing a vehicle from any location within the City of Atlanta; or (3) simply driving a wrecker whether loaded or not on any street or highway within the City of Atlanta.

By omission the Petitioners have misrepresented in the proceedings below the fact that a claim of Federal Pre-emption was plead in the Complaint as originally filed. In paragraph 41 of the Appellants' Complaint (Appendix p. 35) the Appellants alleged as follows:

41.

The local regulation of interstate tow truck operators by the City of Atlanta is preempted by the United States Constitution, the Interstate Commerce Commission, the Federal Motor Carriers Safety Regulations, and other related federal statutes and regulations pertaining to interstate motor carriers.

The attempt to amend the complaint was an attempt only to add the specific citation to the complaint. The District Court's refusal to allow the specific citation did not affect whether or not federal preemption was an issue in the case.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY CONSTRUED 49 U.S.C.A. § 14501 TO PREEMPT LOCAL REGULATION OF THE TOWING INDUSTRY, EXCEPT AS TO THE PRICE OF NON-CONSENSUAL TOWS.

Where a state law is in direct conflict with federal law, the state law, under the Supremacy Clause of Article IV of the United States Constitution is preempted and thereby rendered unenforceable, i.e., "without effect," *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608 (1992). A municipal ordinance is analyzed as if it were a state statute for Supremacy Clause purposes, *Wisconsin Pub. Intervernor v. Mortier*, 501 U.S. 597, 11 S. Ct. 2476 (1991).

Preemption of statutes (or ordinances) based on historic police powers or state delegation of authority are superseded

by federal law when Congressional intent is clear and manifest, *Lewis v. Brunswick, Corp.*, 107 F.3d 1494 (11th Cir.), *cert. dismissed*, __U.S. __, 118 S. Ct. 1793 (1998). State law is displaced by federal law where: (1) Congress expressly preempts state law; (2) Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme; or (3) "conflict preemption" where state law conflicts with federal law or interferes with the achievement of federal objectives. *Lewis*, *supra* at 1500.

The Petitioners concede that the Atlanta Ordinance and these federal statutes should be construed based on principles of "express Preemption" and decline to argue for any "implied Preemption" (Petition page 10).

A. The Challenged Provisions Of The Ordinance Relate To The Route And/Or Service Provided By A Motor Carrier.

The Atlanta Wrecker Ordinance is a "law" or "regulation" relating to the route and/or service of motor carriers (wrecker companies) with respect to the transportation of property (motor vehicles). Tow trucks are motor carriers as defined in the following Acts of Congress and any state or local act which prohibits the operation of a tow truck on "any of the streets" of the jurisdiction is a regulation relating to the route or service of motor carrier.

B. The Federal Aviation Authority Authorization Act Of 1994.

49 U.S.C. § 14501(c) which went into effect on January 1, 1995 provides, in pertinent part, as follows:

> *[A] political subdivision of a State . . . may not . . . enforce a law, regulation, or other provision having*

> *the force and effect of law related to price, route or service of any motor carrier . . . with respect to the transportation of property. 49 U.S.C. § 14501(c)(1)*

A "motor carrier" is defined at 49 U.S.C. § 0102(13) as "a motor common carrier and a motor contract carrier." Motor common carrier is defined as "a person holding itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." 49 U.S.C. § 0102(14). "The term motor carrier as used in new subsection (h) of section 14501 has a broad connotation." 1994 *U.S. Cong. & Ad. News*, p. 1757. The FAAA Act of 1994 mandated the deregulation of intrastate motor carriers of property and expressly prohibited political subdivisions from enacting or enforcing any law or regulation having the force or effect of law relating to the price, route or service of motor carriers of property.

C. ICC Termination Act Of 1995 Applies To (Preempts) Consensual Towing And Exempts (From Preemption) Non Consensual Towing.

The ICC Termination Act of 1995, Public Law 104-88, December 29, 1995, 109 Stat. 80. became effective on January 1, 1996. In response to political pressure from State and local governments concerned that their legal authority to regulate prices charged for non-consent towing had been preempted by the FAAA Ct of 1994, in the ICC Termination Act of 1995 Congress added a third exemption to the preemption statute, 49 U.S.C. § 14501(c)(2)(C), to wit:

> *(c) MOTOR CARRIERS OF PROPERTY.—*
>
> > *to restore the authority of State and local governments to regulate the price charged for non-consensual towing services*

(1) GENERAL RULE. —

Paragraph (1) —

(A) * * *

(B) * * *

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the vehicle owner or operator of the motor vehicle.

The new exemption added by Congress in late 1995 *restored State and local government regulatory authority only as to the price* charged for non-consent towing service; the regulation of the *routes* and *services* of towing services by State and local governments remains preempted under the general preemption provision, 49 U.S.C. § 14501(c)(1).

D. The Challenged Provisions Of The Ordinance Are Preempted By These Statutes.

In addition to the plain language regarding tow trucks in the Acts it must be argued that if Congress wanted to exempt regulations of tow truck operations from the preemptive effects of the Act, as for example it did with household goods movers in 49 U.S.C. § 14501(c)(2)(B), Congress would have done so. It did not. It is a universal principle in the interpretation of statutes that *expressio unius est exclusio alterius*; the specific mention of one thing implies the exclusion of other things.

Where a statute expressly enumerates a specific exclusion from the operation of the statute, an irrefutable inference must be drawn that the statute should apply to all matters not specifically excluded. *United States v. Newman*, 982 F.2d 665 (1st Cir. 1992). Congress is presumed to legislate with knowledge of the basic rules of statutory construction. *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991). Congress created an express exception from the statute for non-consensual towing price regulation, therefore any other exceptions, e.g. regulation of the "routes" or services" of towing operations, or price controls on *consent* towing, are not to be implied. *In re Gerwer*, 898 F.2d 730 (9th Cir. 1990); *United States v. Goldbaum*, 879 F.2d 811 (10th Cir. 1989). There is a heavy presumption that Congress says what it means and means what it says. *Resolution Trust Corporation v. Westgate Partners, Ltd.* 937 F.2d 526 (10th Cir. 1991); *In re Chateaugay Corp.*, 154 B.R. 29 (Bkrtcy. S.D.N.Y. 1993); *In re Orlinski*, 140 B.R. 600 (Bkrtcy. S.D. Ga. 1991).

After reviewing all of the District Court cases decided since the passage of 49 U.S.C. § 14501(c) the Court of Appeals below held,

> We agree with the reasoning of the Harris County and Ace Auto Body courts in that the express reference to towing services in § 14501(c)(2)(c) provides conclusive evidence that Congress intended to extend the general rule of preemption to those aspects of the towing industry that are not listed within the exception.

E. The Intent Of Congress To Expressly Preempt Those Provisions Of The Wrecker Ordinance Which Relate To The "Route" Or "Service" Of Wrecker Services, Is Supported By Extrinsic Aides To Construction.

When, as in the case *sub judice*, the language of the statute is clear and unambiguous, the court must not look beyond the statute's express terms in determining the legislature's intent. *United States v. Evinger*, 919 F.2d 381 (5th Cir. 1990). There is no need to examine the legislative history. *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990).

However, if there were any doubt about the express intent of Congress those doubts are erased by the legislative history *The ICC Termination Act of 1995*. The legislative history of the ICC Termination Act of 1995 House Report 104-311 reads:

> [49 U.S.C. § 14501(c)(2)(C)] provides a new exemption from the preemption of State regulation of intrastate transportation relating to the price of non-consensual tow truck services. *This is only intended to permit States or political divisions thereof to set maximum prices for non-consensual tows, and is* ***not intended to permit re-regulation of any other aspect of tow truck operations.***

(Emphasis supplied). The Committee had been asked to go farther and permit State and political subdivisions thereof to re-regulate all aspects of non-consensual towing services. The Committee provision struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services. H. Rept. 104-311, 1995 *U.S. Cong. & Ad. News*, pp. 831-832.

Congress specifically considered whether or not the authority of State and local governments to regulate *all* aspects of non-consensual towing should be restored, and determined that only the authority with regard to non-consent towing *price* regulation should be restored to state and local governments. Congress specifically rejected the suggestion that matters of "service" and "routes" should be re-regulated.

While the Petitioners may correctly argue that air cargo considerations were the leading motivation for the statutory changes it cannot seriously be argued that the matter of towing companies was not considered by Congress. 49 U.S.C. § 14501(c)(2)(C) specifically and unequivocally refers to "Tow Trucks" and the legislative history discusses local government concerns over tow trucks. Regardless of other, even paramount concerns, over air cargo, it is without dispute that at some point the debate included the towing industry.

II.

THE PRESENT CASE IS NOT THE APPROPRIATE VEHICLE TO DETERMINE THE EFFECT OF 49 U.S.C.A. § 13506(b).

The City's position that 49 U.S.C.A. § 13506(b) argues against preemption of non consensual towing is not a well developed issue in the present case. 49 U.S.C.A. § 13506(b) provides an argument that without certain findings by the Secretary of Transportation or the Surface Transportation Board neither the Secretary or the Board should extend federal jurisdiction into the regulation of "transportation provided entirely in a municipality" or into the "emergency towing of an accidentally wrecked or disabled motor vehicle."

Petitioners and Respondents agree that the factual basis for the present case does not involve either "transportation

provided entirely in a municipality" or the "emergency towing of an accidentally wrecked or disabled motor vehicle." The record in the present case is silent as to the presence or absence of any findings by the Secretary or Board.

As Petitioners point out in footnote 5 on page 19 of their Petition there is currently pending in the United States Court of Appeals for the Fifth Circuit the case of *Cardinal Towing & Auto Repair, Inc. et al. v. The City of Bedford, Texas, et al. Case no.* 98-10194 which was argued February 1, 1999. That case involves the "non-consensual towing of abandoned and wrecked vehicles." That case perhaps has a full record on this issue and would provide an appropriate case in which to decide matters related to 49 U.S.C.A. § 13506(b).

The present case is the only United States Court of Appeals opinion on the preemptive effect of 49 U.S.C. § 14501(c)(2)(C). The record is incomplete at best on issues of non-consensual towing whether the issues be fact or law. The present case is not an appropriate case to determine the issues raised by the Petitioner.

CONCLUSION

For the above and foregoing reasons the Opinion of the Court of Appeals is correct. The Court of Appeals applied the correct principles of statutory construction and reached the correct decision with regard to consensual towing. This case is not the appropriate case to determine the application to non-consensual towing. The case of *Cardinal Towing & Auto Repair, Inc. et al. v. The City of Bedford, Texas, et al. Case no.* which is currently before the United States Court of Appeals for the Fifth Circuit concerns a factual situation of non-consensual towing and would provide a better vehicle for the decisions urged by the Petitioners.

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 98-1173

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In The

Supreme Court of the United States

October Term, 1998

CITY OF ATLANTA, GEORGIA,

Petitioner,

v.

R. MAYER OF ATLANTA, INC.; TONY N. UPCHURCH d/b/a CHUCK'S TRUCK; REGINA JENKINS d/b/a JENKINS WRECKER SERVICE CO.; FRED BURT d/b/a QUALITY WRECKER SERVICE; and UPMAN'S WRECKER SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE TEXAS MUNICIPAL LEAGUE, TEXAS CITY ATTORNEYS ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, TOWN OF PANTEGO, TEXAS, CITIES OF ARLINGTON, TEXAS, AUSTIN, TEXAS, BEDFORD, TEXAS, BIRMINGHAM, ALABAMA, HOUSTON, TEXAS, LUBBOCK, TEXAS, MEMPHIS, TENNESSEE, AND SAN ANTONIO, TEXAS IN SUPPORT OF PETITIONER CITY OF ATLANTA, GEORGIA

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STATEMENT OF CONSENT

Pursuant to Supreme Court Rule 37.2.a, to the extent consent is necessary, written consent of all parties has been obtained to file this Amicus Brief, and such consent accompanies the filing of this Brief.

INTEREST OF AMICI CURIAE[1]

Amici Curiae urge the Court to grant certiorari in this case to clarify the extent to which a federal statute preempts safety regulations or provisions adopted by Cities or local governments concerning towing services.[2]

The Texas Municipal League is a non-profit association of over 1,000 Texas Municipalities. Over 13,000 mayors, council members, city managers, city attorneys, and department heads are member officials of the League by virtue of their cities' participation. The TML legal defense program was established to monitor major litigation that affects municipalities and to file briefs on behalf of cities in cases of special significance to municipalities.

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[1] Disclosure pursuant to Supreme Court Rule 37.6 – The brief was not authored at all by counsel for a party. No fees are to be paid to the author by any person. The entire expense of printing and serving the Brief is to be paid by the Texas Municipal League Intergovernmental Self-Insurance Risk Pool Fund.

[2] 49 U.S.C. § 14501(c)(1) expressly preempts city and state regulation of the routes, prices, or services of motor carriers of property. 49 U.S.C. § 14501(c)(2)(A) creates an exception whereby the preemption provision "shall not restrict" state safety regulatory authority with respect to motor vehicles.

The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of attorneys who represent Texas Cities and city officials in the performance of their duties.

The International Municipal Lawyers Association is a non-profit, professional organization of more than 1,500 members that has provided services and programs to local government lawyers since 1935. IMLA is the oldest and largest association of attorneys who represent this nation's municipalities, counties, and special districts. Since its establishment, IMLA has been an advocate for the rights and privileges of local governments and the attorneys who represent them. More specifically, the IMLA Legal Advocacy Program serves its membership by being an advocate for the interests, positions, and views of local governments on municipal legal issues involved in cases pending in the United States Supreme Court, in federal circuit courts, and in state appellate and supreme courts.

The Town of Pantego, Texas is an incorporated municipality located in Tarrant County, Texas. Pantego, Texas is in the process of reviewing its towing ordinances and regulations.

The City of Austin, Texas is a home rule municipality located in Travis County, Texas. The City of Austin is in the process of reviewing its vehicle towing ordinances.

The City of San Antonio, Texas is a home rule municipality located in Bexar County, Texas. The City of San Antonio is currently a party to an appeal to the United States Court of Appeals for the Fifth Circuit regarding the impact of 49 U.S.C. § 14501 on Municipal

Towing Ordinances. (*Stuckey et al. v. City of San Antonio, et al.*, Fifth Circuit Appeal No. 98-50934). Additionally, the City of San Antonio is currently in the process of revising its private property towing ordinances.

The City of Birmingham, Alabama is the largest city in the State of Alabama, and has for many years regulated both consensual and non-consensual tows within its jurisdiction. The State of Alabama has virtually no regulation of towing either by private car or by commercial wrecker. Given the potentiality for harm to persons and/or property due to an uninsured and uninspected vehicle hauling behind it, on the public rights-of-way, at minimum a 2,000 pound object, it is inconceivable to the City of Birmingham that the Eleventh Circuit could interpret the law in such a narrow and illogical way. Counsel for Amicus, the City of Birmingham, serves both as the City Attorney for the City of Birmingham, and also serves as President Pro Tem of the Alabama House of Representatives. As an attorney actively involved in State and City government, Counsel fully concurs in the need for this Court to clarify the law.

The City of Lubbock, Texas is a home rule municipality located in Lubbock County, Texas. The City of Lubbock has recently become involved in litigation regarding the preemption question as it pertains to municipalities regulating safety issues concerning tow trucks. (Cause No. 5:98-CV-0292-C in the Northern District of Texas, Lubbock Division).

The City of Bedford, Texas is a home rule municipality located in Tarrant County, Texas. The City of Bedford is presently involved in on-going litigation, pending

in the Fifth Circuit, which involves the issue of the impact of 49 U.S.C. § 14501's preemption and safety provisions concerning municipal actions pertaining to tow truck services. (*Cardinal Towing, et al. v. City of Bedford, et al.*, Fifth Circuit Appeal No. 98-10194, District Court Opinion reported at 991 F.Supp. 573 (N.D. Tex. 1998).

The City of Arlington has a comprehensive ordinance regulating nonconsent towing based upon the safety exception to preemption found in 49 U.S.C. § 14501(c)(2)(A). The Eleventh Circuit's opinion in *Mayer* jeopardizes the City's ordinance and creates a regulatory vacuum with regard to nonconsent towing safety.

The City of Houston, Texas is a home rule municipality located in Harris County, Texas. The City of Houston has enacted ordinances that regulate the manner in which tow trucks may operate pursuant to the City's concerns over traffic and highway safety. At least a portion of the City's ordinances were upheld as valid safety provisions pursuant to 49 U.S.C. § 14501(c)(2)(A), and were not subject to preemption under 49 U.S.C. § 14501(c)(1) in a lawsuit reported as: *Harris County Wrecker Owners v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996). The Eleventh Circuit's decision expressly disagrees with the Texas District Court's analysis of the safety exception to preemption in that lawsuit.

Cities or local political subdivisions historically have adopted safety regulations pertaining to non-consent towing of wrecked, or disabled, or abandoned vehicles located on public streets, or in some other position where such vehicles might be hazardous. States such as Texas,

and apparently Georgia, have not adopted comprehensive safety regulations, leaving most aspects of the safety regulation of towing services to cities and counties. However, the Eleventh Circuit's decision states that the so-called safety exception from preemption is limited to safety regulations adopted by a State, and that political subdivisions of a State are not authorized to rely upon the safety exception from preemption.[3] Therefore, the Eleventh Circuit's opinion holds that safety regulations of towing services, which are adopted by a political subdivision of a State, are preempted, and therefore invalid. The Eleventh Circuit's decision expressly disagreed with the opinions in two Texas U.S. District Court cases.[4] Presently, the Eleventh Circuit's decision in the *Mayer* case is the only circuit court opinion construing the safety exception to preemption. Previously, the reported District Court opinions, which construed the safety exception to preemption, reached the conclusion that municipalities or local units of government were allowed to rely upon the

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[3] The Eleventh Circuit's decision was made in the context of regulations pertaining to consensual towing. A fair reading of the Eleventh Circuit's opinion leaves the impression that the Eleventh Circuit's interpretation also applies in the context of non-consent emergency towing.

[4] *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538, 545 (11th Cir. 1998), disagreeing with *Harris County Wrecker Owners v. City of Houston*, 943 F.Supp. 711 (S.D. Tex. 1996); *A.J.'s Wrecker Service, Inc. v. City of Dallas*, Nos. CA3:97-DV1311D, CA3:97-CV2398D, 1998 WL# 185521 (N.D. Tex. April 15, 1998). Another Texas District Court opinion also concluded that cities could adopt safety provisions. *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 991 F.Supp. 573, 576 (N.D. Tex. 1998), appeal pending in the Fifth Circuit – Cause No. 98-10194.

safety exception to preemption. The Eleventh Circuit's opinion creates uncertainty in the law. There is also the risk that other courts will follow the interpretation of the Eleventh Circuit, either as precedent or as persuasive authority. If other courts follow the Eleventh Circuit's lead in striking municipal safety regulation of towing services, this will create a vacuum in the safety regulation of towing services because neither Congress, nor the State of Texas[5] have adopted any comprehensive regulatory scheme pertaining to safety aspects of towing. Therefore, based upon the uncertainty in the law, and based upon the clear need for safety regulation of towing, Amici Curiae requests this Court to grant the Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

A. If the Eleventh Circuit's Decision is Followed, a Vacuum will be Created in the Safety Regulation of Towing Services

At least two states have little or no safety regulation in the context of non-consent, police initiated, tows of wrecked, abandoned, or disabled vehicles. (Texas and Georgia). Texas has some technical requirements for accident scene tow trucks. These requirements may be found at 16 Tex. Admin. Code § 5.513(a)(1) through (7). Generally, the Texas technical requirements for accident scene tow trucks require the tow trucks to be equipped with a

[5] Nor apparently the State of Georgia. (See City of Atlanta's Petition for Writ of Certiorari pp. 15-17 and App. 72-77; See also App. 16-17) Nor the State of Alabama. (See Statement of Interest of Amicus City of Birmingham, Alabama).

specified fire extinguisher, a crowbar or wrecking bar, a broom, or other device for clearing debris, emergency reflectors, safety cones, or flairs, a container to carry glass and debris, a spot light or flash light, and flashing warning lights on the tow truck itself. Texas has no other safety requirements directly applicable to the towing of wrecked, abandoned, or disabled vehicles. In fact, the technical requirements may not even apply in Texas to the towing of abandoned or disabled vehicles that are not wrecked. Texas has no provision requiring tow trucks to appear at the scene of the accident within any specified period of time. Texas has no regulation limiting tow trucks from engaging in the dangerous practice of racing to an accident scene.[6]

Apparently the State of Georgia likewise has adopted little or no safety regulation of towing services pertaining to the non-consent towing of wrecked, abandoned, or disabled vehicles. (See generally The City of Atlanta, Georgia's Petition for Certiorari, page 16, and the statutes and appendices referred to therein.) Congress has not adopted any safety regulations or standards pertaining to towing services in the context of the non-consent towing of wrecked, abandoned, or disabled vehicles. At least in

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[6] A number of District Courts have recognized the validity and wisdom of municipal safety regulations prohibiting or limiting the number of wreckers swarming to the scene of an accident, since such a swarm of wreckers in and of itself could create a safety hazard. See generally *Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F.Supp. 711, 732 (S.D. Tex. 1996); *Ace Auto Body and Towing v. City of New York*, 1997 WL# 669891 (S.D.N.Y. 1997); *A.J.'s Wrecker Service, Inc. v. City of Dallas*, 1998 WL# 185521 (N.D. Tex. 1998).

Texas and Georgia, such safety regulation has customarily been handled at the local level by Cities or Counties. In fact, shortly after Congress adopted the predecessor to 49 U.S.C. § 14501, the Texas Legislature adopted Article 6675c which has now been recodified in the Texas Transportation Code at § 643.201(a). The Texas Statute expressly states:

> "In addition to the registration requirements of this Article, a municipality may regulate the operation of a tow truck to the extent allowed by federal law." (Tex. Rev. Civ. Stat. Ann. Art. 6675c § 11(a), codified at Tex. Trans. Code § 643.201(a)).

Because Congress has not adopted any safety regulations, and because at least the State of Texas and Georgia for the most part leave such regulations to local units of government, there would be no meaningful safety regulation in the context of non-consent towing of wrecked, abandoned, or disabled vehicles if the Eleventh Circuit's interpretation is followed. The public has a need for safety at the scene of wrecked, abandoned, or disabled vehicles. It would be grossly irresponsible for Congress to have preempted local regulations of safety, and for Congress to prevent States from delegating to municipalities such safety regulations before Congress adopts its own safety regulatory scheme, which, of course, it has not done. The Eleventh Circuit in *Mayer* has not offered a compelling reason why it should be assumed that Congress intended such an unfathomable legislative design.[7]

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[7] Amici Curiae borrow some of the thoughts expressed by Judge Barry in his analysis of whether or not Congress intended

Even though such safety regulation historically has been delegated to local units of government, the Eleventh Circuit's *Mayer* opinion would not allow local units of State government to exercise safety authority.

B. The Eleventh Circuit's *Mayer* Opinion Forbidding Local Safety Regulation Conflicts with this Court's Analysis in *Mortier*.[8]

> "When motor vehicles crash into each other, or pedestrians, or into bridges, railings or other fixed objects, they cause problems not only for the owners and occupants of the motor vehicles and pedestrians, but also for society as a whole. Over and above the injuries and fatalities caused by such crashes, when motor vehicles become disabled upon the public streets and highways, they present traffic hazards in and of themselves. They also retard and sometimes completely halt the flow of traffic upon those streets and highways. Since every occupant of a motor vehicle in the United States insists upon moving from wherever he or she is, to some other place as rapidly as possible, it is imperative that obstructions to the flow of vehicular traffic be eliminated with dispatch." *Brumfield Towing Service, Inc. v. City of Baton Rouge*, 911 F.Supp. 212, 214 (M.D.LA. 1996).

The Eleventh Circuit's opinion in *Mayer* interprets 49 U.S.C. § 14501(c)(1) which in pertinent part states:

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to preempt state and local regulation of the prices of non-consent tows. *416 Bloomfield Avenue Corp. v. City of Newark*, 904 F.Supp. 364, 374 (D.N.J. 1995).

[8] *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991).

> "General Rule – except as provided in paragraphs (2) and (3), a State, [or a] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." *Mayer*, 158 F.3d at 543.

For purposes of this Amicus Brief, Amici will assume that the Eleventh Circuit correctly concluded that a tow truck is a motor carrier subject to the provisions of 49 U.S.C. § 14501(c)(1).

Section 14501(c)(1) is the preemption clause which was the subject of *Mayer* and is the subject of this Amicus Brief. However, the preemption clause is modified by an *express exception to preemption* found in 49 U.S.C. § 14501(c)(2)(A) as follows:

> "[the preemption clause in 49 U.S.C. § 14501(c)(1)] . . . shall not restrict the safety regulatory authority of a State with respect to motor vehicles . . . "

Despite the clearly expansive exception from preemption, the Eleventh Circuit incorrectly concluded that safety ordinances or regulations enacted by municipalities or other political subdivisions of a State were preempted because such enactments were not done by a State. 158 F.3d 545-548. In reaching this conclusion, the Eleventh Circuit decided that the Supreme Court decision in *Mortier* was inapplicable.

Mortier involved an analysis of the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) codified at 7 U.S.C. § 136 et seq. The Eleventh Circuit concluded that

Mortier's application of preemption rules, in the context of FIFRA, did not mandate a finding of non-preemption when the Eleventh Circuit interpreted the interplay between 49 U.S.C. § 14501(c)(1) and § 14501(c)(2)(A). (App. 18-22). In short, the Eleventh Circuit concluded that the safety exception to preemption allows States, but not Cities, to regulate safety aspects of towing services.

The Eleventh Circuit incorrectly applies *Mortier*. In doing so, the Eleventh Circuit does not follow well-settled precedent of this Court mandating construction of preemption statutes in a way that would result in a finding of no preemption in this case.

> "Preemption should not be inferred from every enactment that overlaps State regulation. Instead, we start with the assumption that the historic police powers of the State [are] not to be superseded by [a federal statute] unless that was the 'clear and manifest purpose of Congress'. *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). This presumption against preemption applies to state or local regulations of matters of health and safety. *Hillsboro County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 2376, 85 L.Ed. 2d 714 (1985). *Pennington Corporation v. Vistron Corp.*, 876 F.2d 414, 417 (5th Cir. 1989).

Assuming that Congress intended to preempt State and local regulation of the prices, routes, or services of tow truck operations, Congress also created a very broad exception to preemption by stating that the preemption provisions "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." There is no

doubt that towing services implicate many safety concerns. At least the State of Texas and the State of Georgia have taken very little action to create safety regulations of towing services. The Eleventh Circuit would prohibit a City or other local political subdivision from adopting safety regulations. However, in *Mortier*, this Court had no difficulty concluding in the context of FIFRA that Congress' express delineation of authority to States, allowed Cities or other political subdivisions of States, to also adopt safety regulations. *Mortier*, 501 U.S. at 606.

In the context of the present case, the exception from preemption is even broader than the exception involved in *Mortier*. In *Mortier*, the FIFRA exception from preemption expressly allowed States to regulate pesticides, so long as the regulation did not run afoul of express provisions of FIFRA. The exception at issue in this case contains no such limitation. The exception from preemption in the present case makes it clear that any preemptive provision "shall not restrict the safety regulatory authority of a State." Therefore, so long as a safety regulation is involved, the safety regulation could arguably affect a price, route, or service of a tow truck operation, but such a regulation would not be preempted. If anything, a plain reading of § 14501(c)(2)(A) demonstrates Congressional intent to allow broad and far reaching safety regulations.

In *Mortier*, this Court said that when a statute plainly authorized the States to regulate pesticides, and just as plainly was silent with reference to local governments, there was no preemption of local government's safety regulations. This Court stated that in order to find preemption of local safety regulations, there must be a clear and manifest purpose to preempt local authority. This

Court stated that such a purpose cannot be found by "mere silence." *Mortier*, 501 U.S. at 607. The Eleventh Circuit seemingly believed that silence as to delegation to local governments was equal to preemption of local safety regulatory authority.

In the context of the FIFRA provisions, which were not remotely as broad as the exception from preemption involved in this case, this Court said:

> "Indeed, the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the absolute discretion of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities." *Mortier*, 501 U.S. at 608.

The *Mortier* Court recognized that political subdivisions such as Cities are components of the very entity the statute empowers with its exception from preemption. The exception from preemption in this case is even broader than the exception from preemption discussed and analyzed by this Court in *Mortier*. The Eleventh Circuit's opinion clearly conflicts with this Court's analysis in *Mortier*, and in *Rice v. Santa Fe Elevator Corp*, and in *Hillsboro County v. Automated Medical Laboratories*.

If the Eleventh Circuit's opinion is given effect, municipalities or local governments could be prevented from adopting safety regulations pertaining to tow truck operations, even though such safety regulations historically have been exercised at the local level, and at least in

Georgia and Texas, have not been enacted under Statewide regulations or statutes.

CONCLUSION

For the foregoing reasons, the Amici Curiae respectfully request the Court to grant the Petition for Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 15 1999
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No. 98-1173

In The

Supreme Court of the United States

October Term, 1998

CITY OF ATLANTA, GEORGIA,

Petitioner,

v.

R. MAYER OF ATLANTA, INC.; TONY N. UPCHURCH d/b/a CHUCK'S TRUCK; REGINA JENKINS d/b/a JENKINS WRECKER SERVICE CO.; FRED BURT d/b/a QUALITY WRECKER SERVICE; and UPMAN'S WRECKER SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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1998

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ARGUMENT

I. THE ELEVENTH CIRCUIT SHOULD HAVE LIMITED ITS OPINION TO THE FACTS OF THIS CASE.

A. RESPONDENTS CONCEDE THAT THIS CASE INVOLVES ONLY CONSENSUAL TOWING PERFORMED BY TOWERS WHO ARE LOCATED OUTSIDE THE CITY OF ATLANTA CORPORATE LIMITS, AND THE ELEVENTH CIRCUIT SHOULD HAVE LIMITED ITS OPINION TO SUCH FACTS.

In their brief in opposition to the City of Atlanta's Petition, Respondents concede that the case *sub judice* involves a challenge to certain sections of the City's Wrecker Ordinance only to the extent that these sections apply to towers who are located outside the corporate limits of the City of Atlanta who perform consensual towing. (Resp. Br. pp. 1, 2, 3, 12). However, in its decision, the Eleventh Circuit declares that three provisions of the City's Wrecker Ordinance are unenforceable as they apply to all types of towing, not just consensual towing. (Pet. App. 22-23). Respondents assert that the issues related to nonconsensual towing should not be addressed in this case because such issues are currently pending in the United States Court of Appeals for the Fifth Circuit case of *Cardinal Towing & Auto Repair, Inc., et al. v. The City of Bedford, Texas, et al.*, No. 98-1-194 (Resp. Br. pp. 11, 12). Although Petitioner agrees that the instant matter does not involve nonconsensual towing, it is imperative that the Court reject Respondents' arguments and review the Eleventh Circuit's decision since it clearly

declares that the regulation by local governments of non-consensual towing other than to set the price of such tows is prohibited pursuant to 49 U.S.C. § 14501(c). The opinion of the Eleventh Circuit establishes bad precedent which will not be disturbed unless this Court invokes its discretionary authority to review such decision.

B. THE ELEVENTH CIRCUIT ERRONEOUSLY DECLARED THAT SECTION 162-223(c) IS UNENFORCEABLE EVEN THOUGH SUCH SECTION WAS NOT CHALLENGED BY RESPONDENTS.

In this action, Respondents chose only to challenge two sections, Sections 162-223(a) and (c), of the many provisions of the City's Wrecker Code. (Pet. App. p. 25, ¶ 1; p. 30, ¶ 18; p. 31, ¶ 24). However, in its decision, the Eleventh Circuit not only determined that these challenged sections are unenforceable, but it also improperly declared that Section 162-223(b) is unenforceable even though such section was not challenged. (Pet. App. 14, 22, 23). In ruling that this section is unenforceable, the Eleventh Circuit clearly addressed an issue about which it should not have opined, and such opinion should be reversed.

II. RESPONDENTS HAVE FAILED TO PRESENT ARGUMENT AS TO WHETHER STATES ARE PROHIBITED FROM DELEGATING TO THEIR POLITICAL SUBDIVISIONS THE AUTHORITY TO REGULATE CERTAIN ASPECTS OF THE TOWING INDUSTRY PERTAINING TO SAFETY, ROUTE CONTROLS AND INSURANCE.

Although Respondents argue that the regulation of "routes and services" of towers by State and local governments is preempted pursuant to 49 U.S.C. § 14501(c)(1) (Resp. Br. pp. 7, 10), and that the City's ordinances regulate route and/or service (Resp. Br. p. 5), Respondents offer absolutely no response to rebut Petitioner's argument that, pursuant to the exception found in 49 U.S.C. § 14501(c)(2)(A), States shall not be restricted from delegating to their local governments the authority to regulate towing for safety, certain route controls and insurance purposes. As regards State authority to regulate for these purposes, the Eleventh Circuit found that pursuant to the express language of 49 U.S.C. § 14501(c)(2)(A), States can enact laws which are related to these matters. However, the Eleventh Circuit further held that, pursuant to the same language, States are not authorized to delegate such authority to local governments. Respondents' complete failure to address this matter indicates that the Eleventh Circuit's opinion on this issue is tenuous at best.

As has previously been asserted in the City's Petition, the Eleventh Circuit's decision should be reversed because Congress did not expressly prohibit the States from delegating authority regarding certain aspects of the towing industry to their political subdivisions. Rather, by enacting 49 U.S.C. § 14501(c)(2)(A), Congress explicitly

and emphatically stated that the authority of a State to regulate for these purposes shall not be restricted. (Pet. App. 69-70).

Clearly, in determining that States may not delegate such regulatory authority to their political units, the Eleventh Circuit did not consider the severe ramifications of its ruling. By prohibiting States from delegating the authority to regulate for the above-described purposes, the towing industry is left almost completely unregulated. As has been discussed in the City's Petition, there exists no federal regulatory scheme which encompasses the towing industry. Nor does there exist any meaningful state regulation, at least in the State of Georgia and those other states in which lie the cities which have participated in this case as Amici Curiae, over the towing industry because the States have traditionally left such matters to local government. For instance, the State of Georgia relies on its political subdivisions to perform investigations pertaining to criminal history and driving records of tow truck operators. The inability of local governments to perform such investigations places the safety of the public in jeopardy.

III. SECTIONS 162-223(a)-(c) OF THE CITY'S WRECKER CODE ARE CLEARLY RELATED TO PUBLIC SAFETY AND INSURANCE REQUIREMENTS AND DO NOT RELATE TO THE ROUTE OR SERVICE PROVIDED BY A MOTOR CARRIER.

Assuming *arguendo* that this Court accepts Petitioner's position and declares that, pursuant to 49 U.S.C. § 14501(c)(2)(A), States are permitted to delegate to their

local governments the authority to regulate certain aspects of the towing industry, then the Eleventh Circuit's determination that Sections 162-223(a)-(c) are unenforceable should be reversed. In declaring these sections preempted, the Eleventh Circuit opined that they are " 'related to' the provision of consensual towing services because the ordinances limit who is permitted to provide the services and requires [sic] that individuals and companies satisfy various criteria before they provide the services." (Pet. App. 14). Respondents argue that the challenged sections of the City's Wrecker Ordinance relate to the route and/or service of motor carriers because the City's ordinance "prohibits the operation of a tow truck on "any of [its] streets". (Resp. Br. p. 5). Neither the Eleventh Circuit's holding nor Respondent's argument makes logical sense because these ordinances do not attempt to establish the routes upon which a tower may or may not travel and do business, nor do they require or prohibit any services that may be performed by a tower. Whether a tower obtains a license to operate in the City pursuant to Sections 162-223(a)-(c) has absolutely nothing to do with factors such as price, route or service. Instead, such licensure is based on factors that protect the public safety such as criminal history, driving records, and the maintenance of insurance, as is shown below.

Specifically, Section 162-223(a) requires that a license must be obtained prior to using or operating a wrecker on any street within the City limits. (Pet. App. 79-80). Section 162-223(c) prohibits the operation of a wrecker on city streets without first filing a registration of the vehicle by providing the following information:

(1) The make, model and manufacturer's serial number of the vehicle;

(2) Date the vehicle was put into service as a wrecker;

(3) The driver's license number of the owner, if an operator, and of all other operators of the wrecker;

(4) The name of the insurance company with which the owner and all operators have liability insurance coverage with respect to the operation of the vehicle, as required by law;

(5) The permit number of each person who shall drive or operate the vehicle on behalf of the owner; . . .

(Pet. App. 80-81). The public safety purposes of these sections become even more clear when they are read in conjunction with the remaining provisions of the City's Wrecker Code.

For instance, Section 162-223(b), which was not challenged in this lawsuit, requires that any person desiring to obtain a license to use or operate a wrecker must first apply for the license and provide information such as the place where the proposed business will be located, the nature and character of the business, the names of any partners or officers of the business, the charges to be imposed for various services, and the types of insurance held. (Pet. App. 80). The information sought in the application is clearly related to maintaining the general safety and welfare of the City's citizens and visitors and to ensure that minimal amounts of insurance are obtained by the company.

Another provision, Section 162-226(a), requires that any person driving, using or operating a wrecker in the city must first be fingerprinted and then be issued a permit indicating that this person is eligible to use, drive or operate a wrecker. (Pet. App. 85). Section 162-226(b) requires the police department to "conduct a complete search relative to any police record of the person fingerprinted." (Pet. App. 85). Section 162-226(e) provides in pertinent part as follows:

> No permit shall be issued to any person who has been convicted in this or any other country within three years immediately prior to the application for this permit of soliciting for prostitution, illegally dealing in narcotics, sex offenses or any other crime involving moral turpitude. Further, this permit shall not be issued to any person who, within the three years immediately preceding the application for this permit, has been convicted of three or more moving traffic violations. To be eligible for this permit, the person applying must possess a current driver's license as provided by the laws of the state. . . .

(Pet. App. 86). Furthermore, Section 162-232, requires that

> [t]he operator of any wrecker removing a private motor vehicle at the request of any person other than a police officer on duty for the department of police shall report to the department of police the fact that the vehicle was removed and its present storage place, together with a description of the vehicle and the tag number. The report shall be made by the wrecker operator by telephonic communication

> within one hour of the deposit of the vehicle at its storage point.

In addition to these sections, the City's Wrecker Code contains other provisions which impact public safety. (*See, generally,* Sections 162-223(d), 162-225, 162-227, 162-228, 162-229, 162-231, and 162-233 of the City Wrecker Code, Pet. App. 78-92). There can be no doubt that these ordinances do not regulate route or service but instead protect the general welfare and safety of the public. However, the Eleventh Circuit completely ignored these sections in analyzing whether the challenged ordinances pertain to public safety.

Not only did the Eleventh Circuit ignore these various other provisions of the City's Wrecker Code, but it also failed to consider important evidence presented to the district court that the challenged ordinances clearly pertain to public safety. The Affidavit of Atlanta Police Investigator W. P. Lipscomb, which was filed in the district court as part of Petitioner's response to Respondents' motion for summary judgment, establishes that the City has faced a problem with non-permitted towers who tow vehicles from city streets and do not report such tows. (App. 3-7). Investigator Lipscomb testified that it is imperative for public safety purposes that the City have access to certain information about towers doing business in the City, including the towers' business addresses, phone numbers and information about their drivers. (App. 5-6). Investigator Lipscomb further testified that the City Code requirements that permitted trucks must be properly marked with specific lettering and that all tows made at the request of any person other than an Atlanta

police officer must be reported to the police department within a certain amount of time assist the police department and protect the public from unscrupulous practices of towers who are not permitted. (App. 5-6).

Pursuant to the clear language of the exception found in 49 U.S.C. § 14501(c)(2)(A), as long as the City's regulation pertains to safety, certain route controls, or minimum insurance requirements, it will not be preempted even if it affects the price, route, or service of either the consensual or nonconsensual towing industry. The record in this case shows that in order to obtain a license to operate on city streets, all towers must meet the requirements set forth in the unchallenged provisions of the City's Wrecker Code. The record further establishes that all of the unchallenged provisions are related to either safety or insurance matters. Therefore, even if the Court construes the licensure requirements to affect either the price, route or service of the towing industry, the Court should still uphold such licensure requirements because they work in conjunction with the remaining provisions of the City's Wrecker Code and are clearly related to safety or insurance matters. As Petitioner has demonstrated, if the City does not have the ability to enforce the provisions which require that a tower obtain a license and register its vehicles and drivers prior to using a tow truck on City streets or any of the other provisions contained in the City's Wrecker Code, the criminal history and driver records of operators will not be investigated; the maintenance of insurance will not be supervised; there will be no reporting mechanism to the police department making it impossible to determine whether a car has been towed

or stolen; and the public will virtually be sitting prey for unscrupulous and unsafe tow truck operators.

CONCLUSION

Petitioner respectfully requests that its Petition for Writ of Certiorari be granted.

This the 12th day of March, 1999.

Respectfully submitted,

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DEFENDANT'S EXHIBIT I

* * *

AFFIDAVIT OF INVESTIGATOR W.P. LIPSCOMB

After being duly sworn, W.P. Lipscomb deposes and states the following:

1.

My name is W.P. Lipscomb. I am currently an investigator in the Auto Theft Section of the Criminal Investigation Division of the Atlanta Police Department. This affidavit is being given in support of Defendants' Response to Plaintiff's Motion for Summary Judgment in the above-styled case, and for any other purpose deemed proper by the Court. I give this affidavit based upon my personal knowledge. I am competent to make this affidavit.

2.

I have been an investigator in Auto Theft Section since December 1988. At the present time, I am the office investigator and have been in this position since mid-1990. In this position, my duties entail handling 85-90% of the total number of auto thefts reported in the City of Atlanta. Most of the cases I handle involve no lead cases or cases that have no solvability factor. My job is to ensure that all reports regarding abandoned and/or recovered stolen vehicles are accurate. For instance, if a victim wakes up one morning and finds that his car is gone, a teleserve operator will make a report which indicates the car was stolen. Thereafter, I look at all of the

paperwork regarding the vehicle and the report and determine whether the case can be solved. If the case has a lead, I give the paperwork to my sergeant who then reassigns the case to a street investigator.

3.

From 1988-1990, I worked as a street investigator five days a week, but currently, I work street duty one weekend out of every month. When performing street duty, my responsibility is to respond to uniform officers' requests for an auto theft investigator on the scene where arrests usually are made. In some instances, an officer who finds a car which appears to be stolen, whether such car is sitting idle or being driven, will ask for assistance from an auto theft investigator. Once I arrive on the scene, I handle the case from beginning to end. I will obtain any pertinent information from the uniform officer, and then he or she will return to service, and then I would handle the impound of the vehicle, and the arrest and incarceration of any person charged in connection with possession of the stolen vehicle.

4.

On a national average about 60-65% of motor vehicles reported stolen are recovered. The City of Atlanta falls within this range for the recovery of stolen vehicles. Therefore, around 30-35% of the vehicles stolen are not recovered.

5.

City of Atlanta police offices have authorization to impound vehicles abandoned on the expressway system if such vehicle remains on the expressway for more than an eight hour period. During the first part of 1992, I noticed that there appeared to be a number of cars that had been abandoned on the expressway that had not been impounded by the police department. Thus, I decided to investigate the situation and kept records for nine months regarding these abandoned vehicles. In January, 1992, I noticed that ten vehicles had been reported stolen from the expressway system. In February, 1992, I noticed that the number was nine vehicles. In March, 1992 seven vehicles were reported stolen. In April, 1992 and May, 1992, the number was twelve. In June, 1992 the number was sixteen. In July, 1992 there were nineteen reports. In August, 1992 twelve reports were made and in September, 1992, fourteen reports were made. Once I realized there was a pattern of problems with cars being stolen from the expressway system, I called other law enforcement agencies in the metropolitan area, such as Cobb County and Dekalb County, to relay my findings. These other jurisdictions expressed that they had equal problems in their respective areas.

6.

During the time that I was keeping these records, I was made aware by a victim that his vehicle had been towed to Central Metals, Inc., a metal processing company on Marietta Street. Central Metals operates equipment which can grind or crush all types of metals,

including vehicles. Auto Theft approached Central Metals and requested their assistance in regard to those persons who were bringing cars in to be crushed. Central Metals gave us access to all their records and provided us with lists [sic] all persons or companies who were crushing vehicles at their facility. We took these lists and checked all the cars that had been brought in to see if they had been reported stolen to any of the law enforcement agencies in the metropolitan area.

After conducting an investigation regarding the Central Metals records, we determined that numerous individuals/companies who possessed wrecker equipment were responsible for repeatedly bringing to Central Metals cars that had been reported stolen from either the expressway system, private residences or public streets, including those within the City of Atlanta and other police jurisdictions.

Warrants were obtained for the individuals who had brought the stolen cars to Central Metals. I was only responsible for handling one of the first cases that arose from the investigation. I signed four warrants for the arrest of one person, Kenneth Chestnutt. I have personal knowledge that Mr. Chestnutt was convicted on the charges of theft by receiving stolen property and sentenced to eight years in the state prison system.

The majority of the people for whom warrants were issued were not permitted by the City of Atlanta to operate a wrecker. Therefore, investigations took longer because we had no background information, such as business addresses, phone numbers, or driver information other than information which came from Central Metals,

a non-police agency. Our efforts in locating the persons who were stealing vehicles for crushing purposes would have been greatly enhanced had such persons been permitted by the City of Atlanta and had the trucks been registered with the City of Atlanta.

7.

The City of Atlanta's wrecker ordinance assists us in our work because it provides guidelines by which all wrecker companies must abide. For instance, companies authorized to operate in the City of Atlanta are required to be marked appropriately with specific lettering (See City Code Section 162-228). Such markings assist private citizens in their ability to aide police officers with information regarding wreckers which have picked up vehicles on City streets or private property within the City either legally or illegally.

In addition, pursuant to City Code Section 162-232, companies permitted by the City of Atlanta are required to notify the Atlanta Police Department when they remove a private motor vehicle at the request of any person other than a police officer on duty for the Atlanta Police Department. The notice is required to be made within one hour of the deposit of the vehicle at its storage point. (City Code Section 162-232). When the City of Atlanta Police Department receives a call that a car is being impounded a report is filed in APD's Central Records Section indicating the name, phone number and address of the towing service, the make, model, year, tag number and vehicle identification number of the car being impounded. Therefore, when a person calls in to

make a report that his or her car has been stolen, APD can check the impound and repossession reports to see if the car has been located. Clearly, this notification is vital in assisting the Auto Theft Section in recovering abandoned vehicles and in ensuring that a false police report is not filed regarding the status of an abandoned vehicle. It also can serve to protect citizens of and visitors to the City of Atlanta when they believe their cars have been stolen.

Two recent incidents involving Quality Towing, a wrecker company located in Marietta, Georgia, which is not permitted to operate in the City of Atlanta, have occurred which indicate the need for the permitting of out of city companies who operate within the City limits. One incident involved an impound on a rental vehicle which was subsequently reported stolen. The wrecker service, [sic] did not provide the notification required by City Code Section 162-232. Had the proper notification been made pursuant to this code section at the time the vehicle was reported stolen, information would have already been computerized noting that the vehicle had been impounded and should not have been reported stolen. The lack of proper documentation pursuant to this code section resulted in the reporting party (McFrugal Auto Rental) paying a higher amount to retrieve its car than was necessary.

The second incident involved a used car that had recently been purchased that was picked up by Quality Towing at a private property inside the City of Atlanta limits. The new owner reported the car as being stolen. Quality Towing did not notify the City of Atlanta that it had picked up the car. I assume that Quality Towing did

not provide the notification because they are not permitted in the City of Atlanta. The car then sat on the wrecker service's lot for ninety days. Thereafter, the car was condemned by a Fulton County State Court Judge as a derelict vehicle and sold at a public auction.

8.

I have read this affidavit and declare that it is true and correct to the best of my knowledge and belief.

Further, Affiant sayeth not.

/s/ W.P. Lipscomb
INVESTIGATOR W.P. LIPSCOMB
Atlanta Police Department

Sworn to and subscribed before me
this 20 day of 12, 1996.

/s/ Illegible
Notary Public
My Commission expires:
Notary Public, Henry County, Georgia
My Commission Expires March 22, 1998